

United States
Circuit Court of Appeals
For the Ninth Circuit. 7

UNITED STATES OF AMERICA,
Appellant,
vs.
ROBERT CHESTER O'BRIEN,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court for
the Northern District of California,
Southern Division.

FILED

MAR 15 1935

PAUL R. O'BRIEN,
Clerk

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Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

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Attorney for Plaintiff and Appellee.

In the Southern Division of the United States District Court, for the Northern District of California.

No. 19239-L

ROBERT CHESTER O'BRIEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT—WAR RISK INSURANCE.

Plaintiff complains of the defendant and alleges:

I.

That plaintiff is a citizen of the United States and a resident of the Northern District and State of California, and of the City and County of San Francisco therein.

II.

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924 and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III.

That on or about the 23rd day of August, 1918, plaintiff entered the armed forces of the defendant; that he served the defendant as a Lieutenant in its Navy from the said August 1918, to on or about

February 7, 1920, when he was honorably discharged from said service and that during all of said time he was employed in active service of defendant.

IV.

That immediately after entering the defendant's said service plaintiff made application for and was granted insurance in the sum of \$10,000 by the defendant, who thereafter [1*] issued to plaintiff its certificate No. T-3,876,524 of his compliance with said acts, so as to entitle him and his beneficiaries to the benefits of said acts, and the rules and regulations of said bureaus and the directors thereof, and that during the term of his said service the defendant deducted from his pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the defendant. That plaintiff paid all premiums promptly when the same became due on said policy until March 31, 1925.

V.

That on or about March 31, 1925, and while serving the defendant as aforesaid, the plaintiff contracted certain diseases, injuries and disabilities resulting in and known as traumatic arthritis and synovitis resulting the loss of right leg, heart trouble, kidney trouble, nerve trouble and other disabilities shown by the records and files of the U. S. Veterans' Administration.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

VI.

That said diseases, injuries and disabilities have continuously since March 31, 1925, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in approximately the same degree. That plaintiff has been, ever since March 31, 1925, and still now is, permanently and totally disabled by reason of, and as a direct and proximate result of such disabilities above set forth.

VII.

That plaintiff on March 17, 1931, made application to the defendant, through its Veterans Bureau and the Director [2] thereof, for the payment of said insurance for permanent and total disability, and that said Veterans Bureau, and the Director thereof have refused to pay plaintiff said insurance and on April 26, 1932, disputed plaintiff's claim to said insurance and disagreed with him concerning his rights to the same.

VIII.

That under the provisions of the said acts and other acts amendatory thereof, plaintiff is entitled to the payment of Fifty-seven and 50/100 Dollars (\$57.50) for each and every month transpiring since March 31, 1925, and continuously thereafter so long

as he lives and continues to be permanently and totally disabled.

IX.

That plaintiff has employed the services of Alvin Gerlack, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

WHEREFORE plaintiff prays judgment as follows:

First: That plaintiff since March 31, 1925, has been and still is, permanently and totally disabled.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of \$57.50 per month for each and every month from the said March 31, 1925, and continuously so long as he lives and remains permanently and totally disabled.

Third: Determining and allowing to plaintiff's attorney [3] a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided

by Section 500 of the World War Veterans Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

ALVIN GERLACK,

Attorney for Plaintiff.

United States of America,
District and State of California,
City and County of San Francisco—ss:

ROBERT C. O'BRIEN, being first duly sworn, deposes and says:

That he is the plaintiff in the above entitled action.

That he has heard read the foregoing complaint and knows the contents thereof.

That the same is true of his own knowledge and belief except as to those matters stated upon information and belief and that as to those matters he believes them to be true.

ROBERT C. O'BRIEN.

Subscribed and sworn to before me this 16th day of May, 1932.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed May 16, 1932. Walter B. Maling, Clerk. [4]

[Title of Court and Cause.]

AMENDED COMPLAINT.
WAR RISK INSURANCE.

Plaintiff complains of the defendant and alleges:

I.

That plaintiff is a citizen of the United States and a resident of the Northern District and State of California, and of the City and County of San Francisco therein.

II.

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924 and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III.

That on or about the 23rd day of August, 1918, plaintiff entered the armed forces of the defendant; that he served the defendant as a Lieutenant in its Navy from the said August 23, 1918, to on or about February 20, 1920, when he was honorably discharged from said service and that during all of said time he was employed in active service of defendant.

IV.

That immediately after entering the defendant's said service plaintiff made application for and was granted insurance in the sum of \$10,000 by the defendant, who thereafter issued to plaintiff [5] its

certificate No. T 3,876,524 of his compliance with said acts, so as to entitle him and his beneficiaries to the benefits of said acts, and the rules and regulations of said bureaus and the directors thereof, and that during the term of his said service the defendant deducted from his pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the defendant. That plaintiff paid all premiums promptly when the same became due on said policy until March 31, 1925.

V.

That on or about March 31, 1925, and while serving the defendant as aforesaid, the plaintiff contracted certain diseases, injuries and disabilities resulting in and known as traumatic arthritis and synovitis resulting in the loss of use of right leg, heart trouble, kidney trouble, nerve trouble and other disabilities as shown by the records and files of the U. S. Veterans' Administration.

VI.

That said diseases, injuries and disabilities have continuously since March 31, 1925, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in approximately the same degree. That plaintiff has been, ever since March 31, 1925, and still now is, permanently and totally disabled by

reason of, and as a direct and proximate result of such disabilities above set forth.

VII.

That plaintiff on March 17, 1931, made application to the defendant, through its Veterans Bureau and the Director thereof, for the payment of said insurance for permanent and total disability, and that said Veterans Bureau, and the Director thereof have refused to pay plaintiff said insurance and on April 26, 1932, disputed plaintiff's claim to said insurance and disagreed with him concerning his rights to the same. [6]

VIII.

That under the provisions of the said acts and other acts amendatory thereof, plaintiff is entitled to the payment of Fifty-seven and 50/100 Dollars (\$57.50) for each and every month transpiring since March 31, 1925, and continuously thereafter so long as he lives and continues to be permanently and totally disabled.

IX.

That plaintiff has employed the services of Alvin Gerlack, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments

until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

As and for a second and separate cause of action, plaintiff alleges:

I.

Plaintiff adopts and reincorporates in this, his second cause of action, paragraphs I, II, III, IV, V, VII and IX of his first cause of action and makes them a part hereof, the same as if expressly set out in full herein.

II.

That at the time plaintiff ceased to pay said premiums due on said insurance, he was suffering from a compensable disability, to-wit, traumatic arthritis and synovitis, of ten per centum (10%) or more degree of disability, resulting directly from injury and disease contracted in line of duty while in active service of the defendant: that in pursuance of the provisions of the War Risk Insurance Act and the World War Veterans' Act of June 7, 1924 as amended, [7] plaintiff was given various compensation ratings by the defendant's Bureau of War Risk Insurance, and also its Veterans' Bureau, namely of a compensable degree of disability of ten per centum (10%) or more from February 7, 1920, to the present time all of which ratings are for a compensable degree of disability. That although entitled to compensation from the defendant's Veterans' Bureau, on account of said ratings

made by it, plaintiff drew no compensation from the defendant's Veterans' Bureau for any disability prior to August 4, 1930.

That by reason of non-payment of premiums claimed to be due on his said insurance as aforesaid, the defendant claims that said insurance lapsed on April 1, 1925. That at all times from and after the 1st day of April, 1925, up to and including July 2, 1927, through the application of compensation to which he was entitled under his disability ratings as aforesaid and section 302 of the War Risk Insurance Act as amended December 24, 1919, and which was then uncollected, plaintiff's said insurance was revivable and revived in the sum of Ten Thousand (\$10,000.00) Dollars as directed by said statutes, including section 305 of the World War Veterans' Act of June 7, 1924 as amended, and became payable to him in monthly installments of Fifty Seven and 50/100 Dollars (\$57.50) per month as of and from the date of the beginning of his permanent and total disability and during the time he continues to be so totally and permanently disabled and in case of his death after the beginning of his permanent and total disability, thereafter to his beneficiary until the total of two hundred forty (240) installments of said insurance have been paid, less the unpaid premiums and interest thereon at five per centum (5%) per annum, compounded annually, in installments as provided by law. [8]

III.

That ever since the said 1st day of April, 1925, and at all times since that date, there has been due

to plaintiff said sum of Fifty Seven and 50/100 Dollars (\$57.50) for each and every month transpiring since said date, less unpaid premiums and interest thereon at five per centum (5%) per annum, compounded annually in installments as provided by law, and that there will be due in the future like monthly installments in a like amount so long as plaintiff remains permanently and totally disabled. That the defendant has wrongfully and unlawfully refused to pay the plaintiff any of said monthly installments of Fifty Seven and 50/100 Dollars (\$57.50) per month due plaintiff since April 1, 1925.

WHEREFORE plaintiff prays judgment as follows:

First: That plaintiff since March 31, 1925 has been and still is, permanently and totally disabled.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of \$57.50 per month for each and every month from the said March 31, 1925 and continuously so long as he lives and remains permanently and totally disabled.

Third: That plaintiff have judgment against the defendant for all of the monthly installments of said insurance in the amount of \$57.50 per month for each and every month beginning with the date upon which he is found to be permanently and totally disabled, to-wit: at any time between April 1, 1925 and July 2, 1927, during all of which time he had uncollected compensation due him from the United States Veterans' Bureau sufficient to have paid all

premiums due on said insurance less the unpaid premiums and interest thereon at five per centum (5%) per annum compounded annually in installments as provided by law and continuously thereafter so long as plaintiff remains permanently and totally [9] disabled.

Fourth: Determining and allowing to plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance recovered in this action, payable in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

ALVIN GERLACK,
Attorney for Plaintiff. [10]

United States of America,
Northern District and State of California,
City and County of San Francisco—ss.

ROBERT C. O'BRIEN, being first duly sworn, deposes and says:

That he is the plaintiff in the above entitled action.

That he has heard read the foregoing amended complaint and knows the contents thereof.

That the same is true of his own knowledge and belief except as to those matters stated upon information and belief and that as to those matters he believes them to be true.

ROBERT C. O'BRIEN.

Subscribed and sworn to before me this 12th day of August, 1932.

HENRIETTA HARPER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 12, 1932. Walter B. Maling, Clerk. By B. E. O'Hara, Deputy Clerk. [11]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT.

The United States of America for answer to the amended complaint of plaintiff herein denies each and all of the allegations thereof.

WHEREFORE defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein incurred.

Dated: September 16, 1932.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Service of the within answer by copy admitted this 17 day of September, 1932.

ALVIN GERLACK,
Attorney for

[Endorsed]: Filed Sept. 17, 1932. [12]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19,239-L

ROBERT CHESTER O'BRIEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

THIS CAUSE came on regularly to be tried on the 13th day of September, 1933, and was thereafter regularly continued to the 14th then the 15th, then the 16th day of September, 1933, Alvin Gerlack, Esq. appearing as counsel for the plaintiff, and H. H. McPike, Esq., United States Attorney, and Thos. C. Lynch, Esq., Assistant United States Attorney for the Northern District of California, appearing as counsel for the defendant: a jury of twelve persons was regularly impaneled and sworn to try said cause: witnesses on the part of plaintiff were sworn and examined, and documentary evidence on behalf of the parties hereto, was introduced, and after hearing the evidence, the arguments of counsel and the instructions of the Court the jury retired to consider of their verdict, whereupon the jury returned into court their verdict in words and figures as follows to-wit:

“(Title of Court and Cause.)

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff, Robert Chester O’Brien, on the second cause of action, and fix the date of his permanent and total disability from following continuously any substantially gainful occupation beginning June 30, 1927.

September 16, 1933.

STANLEY P. DOYLE,
Foreman.” [13]

And the Court having fixed plaintiff’s attorney’s fees in the amount of ten per centum (10%) of the amount of insurance recovered in this action:

IT IS ORDERED, ADJUDGED and DECREED that plaintiff Robert Chester O’Brien, do have and recover of the United States of America the defendant, seventy-five (75) accrued monthly installments of insurance at the rate of Fifty-seven and 50/100 Dollars (\$57.50) per month beginning June 30, 1927, up to and including the monthly installment due August 30, 1933, less the unpaid premiums due on June 30, 1927 on plaintiff’s said policy, as shown by the records and files of the defendant’s Veterans Administration, and also less interest on said unpaid premiums at five per centum (5%) per annum compounded annually in installments as provided by law.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendant the United States of America deduct ten per centum (10%) of the amount of insurance recovered in this action, and pay the same to Alvin Gerlack of San Francisco, California, plaintiff's attorney for his services rendered before this Court, payable at the rate of one tenth (1/10) of all back payments and one-tenth of all future payments which may hereafter become due on account of said insurance, said amounts to be paid by the United States Veterans Administration to said Alvin Gerlack or his heirs out of any payments to be made to Robert Chester O'Brien or his beneficiary or estate in the event of his death before two hundred and forty (240) of said monthly installments have been paid.

Judgment entered: September 16, 1933.

WALTER B. MALING,

Clerk.

Approved as to form:

THOS. C. LYNCH,

Assistant United States Attorney. [14]

[Title of Court and Cause.]

AMENDED ENGROSSED BILL OF
EXCEPTIONS.

BE IT REMEMBERED that on the 13th day of September, 1933, the above-entitled cause came on for trial; Mr. Alvin Gerlack, attorney, appearing

for the plaintiff, and Messrs. H. H. McPike, United States Attorney for the Northern District of California, and Thomas C. Lynch, Assistant United States Attorney for said district, appearing for defendant; a jury was impaneled and sworn and thereupon the following proceedings took place:

STIPULATION.

It was stipulated that plaintiff was a resident of San Francisco, California; that the action was brought under the World War Veterans Act and that plaintiff entered the Naval Service of the United States and served from August 23, 1918, to February 20, 1920; that plaintiff carried \$10,000, insurance and that he paid premiums to March 1925 and the 31 day grace period expired May 1, 1925; that there was a disagreement under Section 19 of the World War Veterans Act.

Mr. GERLACK: Concerning the second cause of action, it is stipulated as I understand it, that he had a compensable degree of disability of 10% or more from February 20, 1920, or [15] rather when he was released from active duty in February 1920 up until the present time and that on April 1st, 1925, he was suffering from this compensable degree of disability and at that time he had uncollected pension due him: that he also was suffering from a compensable degree of disability of 10% or more, as found by the Veteran's Bureau on July 2, 1927, and on that date July 2, 1927, he had uncollected compensation or pension due him in an

amount more than sufficient to have paid all of the back premiums on his insurance from April 1st, 1925, up to and including July 2, 1927.

Mr. LYNCH: I think it won't be necessary that he had back compensation sufficient to pay his premiums.

Mr. GERLACK: And that if the jury should find that he was permanently and totally disabled on or prior to July 2, 1927, it is admitted that the other two requirements of Section 305 were complied with, namely compensable degree of disability and payment of premiums.

Mr. LYNCH: Yes.

TESTIMONY OF
ROBERT CHESTER O'BRIEN.

Robert Chester O'Brien, the plaintiff, called in his own behalf, being first duly sworn, testified as follows:

"I am the plaintiff in this action. While serving in the Navy as a Lieutenant during the World War, I was blown up in a mine explosion. I was on a collier called "Lake Pleasant". We were a collier but also mine sweeping. I am just a little nervous. I will have to go a little slow. We had kites out from either side of the vessel, cutting the mines. This particular time we cut a German mine and it fouled the kite. I was executive officer of the ship and we were in the habit of hauling the peravain in and then letting it go with a run and see if it would clear the mine from the kite. In this particular

(Testimony of Robert Chester O'Brien.)

instance it blew up in the kite; it [16] blew me upward perhaps 10 to 15 feet from the kite reel."

Mr. LYNCH: "In order to save time, we are willing to stipulate that Mr. O'Brien actually received an injury during the war."

Mr. O'BRIEN: "I was blown in the shell and the reel was maybe 5 to 10 inches from the deck and my leg went between the deck and the reel and cut me across under the knee here. It did not amount to much at that time; I didn't even know the government knew anything about it until I resigned; I was treated aboard ship by the Pharmacist Mate for a week or ten days; there was no doctor on the ship. The Pharmacist Mate was the Chief Petty Officer, an ordinary Chief Petty Officer according to his rating, but as a rule, in this particular instance I think he was Pharmacist Mate First Class, an enlisted man. That was the only medical personnel on the collier. He treated my leg for about a week or ten days and I got well enough so I could get around. We were short of crew,—well we were not short of crew, but had a very inexperienced crew. I had to turn to again. I guess it was about maybe one month later we went into Bassens, France. I went ashore; I was using a cane—I had not recovered from the mine explosion when I went through the dock at Bassens, France. I was walking with the help of a cane at the time. Of course during the war there were no lights on the dock. There was one of the planks out. I went between and I just happened to catch the place that I had injured the

(Testimony of Robert Chester O'Brien.)

knee, directly the same place. Well I was carried aboard ship. We went into Brest and a Naval Officer came aboard there, one of the Medical Corps. He ordered me transferred to the hospital as soon as we got into Cardiff (Wales). I was in the hospital there perhaps one month. I was treated for lacerated leg, but at that time it would not heal up—sort of a pusy condition—it—I don't know how to describe it. It was the same knee that bothers me now. I was in Cardiff—well I was actually hospitalized perhaps a month or [17] more, maybe six weeks, but I was altogether there about three months in all. I was on a cane and they gave me light duty on the examining board. Well I apparently got better. I asked to be put back in active duty and they asked for volunteers for the North Sea and I volunteered to go up there. I did not notice that there was anything wrong with my leg then, until I got up there. Well, it was very bad weather in the North Sea and I noticed then occasionally at night the knee would lock on me. I could't move it at all. That was approximately perhaps July of 1919. Well the weather up there at that time,—well of course the weather in the North Sea was always bad, with practically no calm seas.

The first assignment I got up there, of duty—I had had experience in the army with small craft; I took a tug over to France for the army and they made me pilot of the mine sweepers, taking them in alongside of the collier to fuel. Then afterwards—

(Testimony of Robert Chester O'Brien.)
perhaps in about two months I guess, they put me in command of the "Millard". Well the duty there was—well we planted 56,000 mines up there and we had to sweep them up, so I was in charge of mine sweeping. I was engaged in that duty until it was finished around December, 1919. My leg bothered me during all of that time. The principal bother of it then, it would lock on me. I couldn't—at night—well when I would try to get out of bed, I would find I could neither bend it one way or the other. The only way I could manage was to manipulate it and keep working it, and it then would sort of snap and come into place. I had no doctor aboard at the time. Then it started to pus a little bit, but there was—well I was pretty proud of the command I had and I never did report the leg then until—well I was suffering all of the time I was up there and expecting to come home when the mine fields were finished, but instead of that I got an order to tow a broken down sub-chaser then from Stefangon, Norway, to New York, and I got her back and got up [18] to Portsmouth, New Hampshire, and simply broke down. I went to the doctor there and he asked me where I lived and I told him. They ordered me back to California. I got up to Mare Island and they asked me if I would go as Executive Officer of the collier, then the "Celtic". That was the first ship I had been aboard that had a doctor. Well the moment he noticed I was lame and nervous he told me he would have to look me over. He looked me over

(Testimony of Robert Chester O'Brien.)

and told me to go to the Hospital. He sent me to the Mare Island Hospital. I first noticed that I was nervous—I have been nervous since the war more or less, but my nerves—I haven't lost complete control of my nerves—I kept losing confidence in myself all of the time from 1920. Along about 1925 when I was examined for my insurance I was a nervous wreck. I was in the Mare Island Hospital off and on I would say for about two months.

While in the hospital I was treated for my right leg the same leg that was injured in the mine explosion. I was discharged from active service on February 7th, I think it was, 1920. And then I served two enlistments, two four year periods I believe; 1923 was the end of the second four years, I think it was. But I was actually discharged from service in February, 1920.

The witness then identified a photostatic copy of his orders placing him on inactive duty. This was introduced and received in evidence as Plaintiff's Exhibit 1 and read to the jury.

(Testimony of Robert Chester O'Brien.)

This document, PLAINTIFF'S EXHIBIT 1, read as follows:

“Navy Department, Bureau of Navigation,
Washington, D. C.

February 7, 1920.

From: Bureau of Navigation,

To: Lieutenant Robert Chester O'Brien,
USNRF-3

Naval Hospital, Mare Island, Cal. (Com-
mandant, Twelfth Naval District.)

Subject: HONORABLY DISCHARGED
FROM ACTIVE SERVICE. [19]

1. Upon your discharge from treatment at the Naval Hospital, Mare Island, Cal., you will proceed to your home and upon arrival will regard yourself honorably discharged from active service in the Navy.
2. Immediately upon your arrival home, report your local address in full and date of arrival to the Bureau.
3. The Bureau takes this opportunity to thank you for the faithful and patriotic services you have rendered to your country in the World War.

(Name illegible)

REAR ADMIRAL, U. S. Navy.”

Attached to and made a part of Plaintiff's Exhibit 1, there is a citation reading as follows:

“THE SECRETARY OF THE NAVY,

Washington, 11 November 1920.

SIR: The President of the United States takes pleasure in presenting the NAVY CROSS TO

(Testimony of Robert Chester O'Brien.)

LIEUTENANT ROBERT C. O'BRIEN, U. S. N. R. F. for services during the World War as set forth in the following:

CITATION: "For distinguished service in the line of his profession as commander of the U. S. S. MALLARD, a mine sweeper engaged in the difficult and hazardous duty of sweeping for and removing the mines of the North Sea Mine Barage."

For the President, Josephus Daniels,
Secretary of the Navy."

Plaintiff, the witness, continuing: I actually arrived home and was actually out of the service five days later I presume, after the date of that last order. Between the date of my discharge in 1920 and April 1, 1925 I tried to follow the only thing I knew what to do—go to sea. While following the sea I was Master Mariner, in other words, Captain of various ships. During these years it was just a struggle up to the time I completely collapsed in 1930—I couldn't even try it any more.

The circumstances under which my insurance lapsed for non-payment of premium due April 1, 1925, were as follows: naturally I never paid any premiums at all. I left Mrs. O'Brien an allotment from the owners, and out of that she took care of the insurance. So this particular trip she joined me in San Pedro and we went to the Islands, then up to Vancouver, then down to San Francisco. After my insurance lapsed I tried to reinstate it.

(Testimony of Robert Chester O'Brien.)

I received communications from the Veterans Bureau. They refunded the premiums [20] that I had paid in the interim. (There was then received in evidence PLAINTIFF'S EXHIBIT NO. 2 consisting of three letters). Mrs. O'Brien remitted these premiums. (The reason for the refund was given as follows in one of the letters: Insurance lapsed April 1, 1925. Application for reinstatement rejected on account of physical condition of applicant.)

Prior to 1925—I think it was about three months after I was discharged from the Navy, I took a command called "Nishnaha". I made two trips to Australia. Those were six months' trips. My leg got so bad then I had to ask for a lay-off. Well I came back to California here and consulted Dr. Carpenter. He is dead now. He told me I was crazy to go to sea. I went back to New York and tried it again on the ship called "Easterner" of the same company. I could not walk. That was due to my right knee. My right knee was stiff, so painful I could not walk on it without a cane. I could not sail the ship on account of my physical condition and resigned. That was the middle of 1923. At that time my leg felt—well it was pusing a little bit. Well it was simply painful to walk on it, and I couldn't sleep at night with it. All I can say is, like any other crippled condition, I was suffering with my leg all of the time. My leg bothered me at night, it would lock on me. The joint would

(Testimony of Robert Chester O'Brien.)

lock when I would be asleep and I would wake up like one in a cramp. I could not take a step on the leg. I could not step on my leg on account of the pain. If I rested my weight on it it would not hold me because it was in a bent condition. I couldn't straighten it out. It would lock in that position. I first noticed the locking when I was in service on the "Mallard", I mean the locking. So far as the locking is concerned, I have experienced the same trouble from then on up to the present. It locks on an average of two or three weeks and perhaps takes a half or three quarters of an hour. So far as my sleep being disturbed, the pain [21] in my knee would keep me awake. I experience that same condition all of the time at present. At the present time at night I very seldom ever sleep more than two hours at a time, but it is not entirely due to my knee. I also get short of breath. I have had that trouble I think since perhaps 1925—I could not say exactly what month. I had this shortness of breath badly when my insurance was cancelled. That was the middle of 1925. I noticed the shortness of breath about the middle of 1925. On April 1, 1925, I was running on the "Santa Cruz" for the Grace Line Co. I was master of the "Santa Cruz" I think about ten or eleven months. She carried 30 passengers but otherwise was a freight vessel. She was engaged in the West Coast of South America trade, she was running from Vancouver as far south as Southern

(Testimony of Robert Chester O'Brien.)

Chile, Sinafo, Valparaiso, with a trip occasionally to the Islands. Due to the fact during the bad, foggy weather the particular times a man should be on the bridge I was unable to get on the bridge on account of my knee being in the condition that I couldn't walk, the Chief Officer performed my duties on the bridge at that time. The Chief Officer is the First Mate. The Master picked the Mates on the ship. I had the selection of those myself. It is usual for the Chief Officer or First Mate to carry Master's papers according to the type of vessel, not necessarily on that type of vessel such as the "Santa Cruz". During foggy weather, and entering and leaving port, it was my duty to actually be on the bridge navigating the ship during the time I was Master of the "Santa Cruz". During bad and foggy weather it was very seldom I could get on the bridge coming in and out of port, perhaps 50% of the time I had to leave it to the Mate. This was true during the period all of the time I was on the "Santa Cruz" about eleven months. This was true during all of that eleven months. The duties which devolved upon me for instance when the ship was [22] down in South America was going ashore and visiting the agents, visiting the Consul, presenting the papers to the Consul, namely, manifests, register, crew list. I never performed that duty personally. At that time my physical condition was such that I could not manage to get around or down the gangplank into the launch to go ashore, therefore I had to send the purser to do my business

(Testimony of Robert Chester O'Brien.)

ashore. That was true during all of that time I served as master of the various vessels on that run. I was engaged in that run from 1925 until 1927; I resigned. I was performing my duties unsatisfactorily. I was running for the Grace Line at that time. When I resigned I was on a ship called "Rotarian", formerly known as the "Condor". I went on the "Rotarian" in 1925—I think it was 1925. I was on her until 1927. I can't remember just what part of 1925 I did go on her. I think I resigned about July of 1927. After I resigned I went to the U. S. Marine Hospital at the Presidio of San Francisco, where I was treated for my right leg again. This condition of my leg was continuous during all of the time I was Captain of the "Rotarian". I am conscious all of the time of a pain in my leg, but in fact there has not been a second since my discharge that I am not conscious that the leg pains me. It is acute when I walk or try to do anything. I cannot straighten it—it will not straighten. I can move it some but I cannot straighten it completely out and that is the condition that existed right straight along while I was employed as master of these vessels and as a result I had to do my work entirely by direction of another man. I was nervous in 1920. My nervousness has been a progressive trouble. I cannot say I have always been as nervous as I am now. I have been continuously nervous since 1920. The way this nervous condition presents itself to me

(Testimony of Robert Chester O'Brien.)

and just how I feel under that nervous strain—the first time I knew it, was fear at sea, which I never had in my life until I was injured. Fear first, then lack [23] of confidence in myself. My mind won't—I can't concentrate. I can't think like I used to think. Then I want to cry for some unknown reason, which I don't know what I want to cry all the time for, but I just do. I do not know the name of whatever is wrong with me—myself, but I guess I must be irritable. The pain in my leg causes me to think of myself—to think of my leg. It is hard to think of anything else—this thinking of my leg—well it is the fear always of falling, for one thing. I have taken bad falls with it. It is just a constant—I am not able to explain. You just know you are in pain all of the time—that is all I know about it.

Plaintiff then offered photographs of plaintiff's knee which were received as PLAINTIFF'S EXHIBIT 3 for the purposes of illustration.

Since I have been discharged from the Navy, my knee has been apparently, practically the same way as it appears in those photographs (Plaintiff's Exhibit 3) except perhaps not quite so swollen. When I was discharged it may possibly not have been swollen such as it is now, that is, the inflammation is probably not as great there. It was swollen as bad in 1927 as these photographs show. I was not operated on for my leg in 1927. The operation was suggested but I was simply too cowardly and

(Testimony of Robert Chester O'Brien.)

nervous and wouldn't stand it. I would not let them operate.

I applied for a position with the United States Government. I tried—I made application for Civil Service examination, with the result that they sent it back to me for a physical examination. I was not given a physical examination, they would not examine me. I applied for a Civil Service position. I was sent for physical examination to the Veterans Bureau. They refused to examine me. I went there personally at the instance of the instructions of the Civil Service Commission. I wrote them a letter [24] and asked them if there was ever a change in the ruling where I could get work without being physically examined, to let me know.

Plaintiff then offered and there was received in evidence PLAINTIFF'S EXHIBITS 4 AND 5 which was the A. G. O. report from the Secretary of the Navy. This record certified by the Secretary of the Navy, was taken out of the government file at the time of the trial, and contains the transcript of medical treatments while plaintiff was in the Navy.

I never had any trouble before such as I have described here, prior to the time I went into the Navy. I never had any nervous trouble. I never had any difficulty in sleeping before this explosion. The pain, nervous condition, and about my leg—they were not in existence before I entered the service of United States. I never had any trouble following

(Testimony of Robert Chester O'Brien.)

my occupation as a seafaring man prior to the war—prior to these disabilities.

Cross Examination.

It is a fact that I injured this knee in 1912 before I went into the service. I also injured it in 1916 prior to my injury in service. I think I took command of the SS "Santa Cruz" on February 19, 1934. The position I held on the boat at that time, I took command, I was the Mariner, I mean the Captain of the boat. The "Santa Cruz" is approximately 394 feet 2 inches long and 52 feet 3 inches wide. I stayed on the "Santa Cruz" I think about one year, during all of that time I was Master. At that time the boat was engaged in the West Coast of South America trade. We carried passengers. We had accommodations for about 25, but as a rule we had maybe 5 or 6. She was a combination passenger and freight boat. A boat of that type is not better to command than an ordinary freighter. I would not prefer it. It is a matter of opinion as to whether it is considered a better boat by most captains if they are on a freight boat, to be transferred or promoted to a combin- [25] ation boat of this type, as a step to getting a passenger boat. I personally would not want a passenger ship at any time. Regarding the duties of the Master of a vessel of that type of the "Santa Cruz", well—a Master first of all is responsible for the safety of the vessel, the safety of the crew, the safety of the passengers, the efficiency of the crew, the efficiency

(Testimony of Robert Chester O'Brien.)

of his ship, the safe navigation of his ship, the up-keep of his ship—and generally the handling of all of the ship's business. The Master—there is no one on the ship that is not responsible to the Master and the Master is the only one responsible for everything on the ship. In other words, responsibility is the principal duty. Had there been any complaint as to improper care being taken for the safety of the passengers or of the crew, or had I been derelict in my duty as to any of these things, had there been any complaint—there is no one to complain to but the Master. The conduct of the ship was not carried on properly, the stowage was bad, I was continually criticised for bad stowage because I could not personally see to it myself. I selected my own Mates. The Mate theoretically perhaps, ordinarily attends to the stowage, but the Master is responsible for the stowage. In that trade, the chief officer was usually the one who took No. 1 and 2 Hold, and the Second Officer 4 and 5 or 3 to 5. The cargo is stowed by stevedores, but it was done under the supervision of the Mates. They were responsible to me to see that it was done. A good ship master would go down there, would go down into the hold to supervise the stowage of the cargo. In going into a harbor, the Quartermaster takes the wheel. The Captain is right there, he brings the vessel in. He is right by the side of the Quartermaster. He orders the movements and direction of the vessel, unless there is a pilot aboard, then he simply ad-

(Testimony of Robert Chester O'Brien.)

vises the Master. That is done by all Captains—is a customary act. I could not do that, in going into any port—not into any [26] port. I would say that on the West Coast I would perhaps average two out of five ports. I would not be able to do it, but the other three ports I could do it. I could do it in three ports and not in the other two because it would depend entirely on the weather. If foggy at the time, I would be laid up in the bunk and could not get out. In other words I find foggy weather an incitement to my difficulty, but if the weather were fair and the conditions favorable, the tendency was to relieve me of a great deal of pain. Well, it is like this cane, on a sunny day I can go along without it, on a sunny, hot day. During the winter I can't manage at all—or in foggy weather. I could bring the ship into two out of the five ports myself and be actually present on the bridge. I simply said that approximately, as a matter of fact the ship was safely brought into all of those ports during all the time I was on the "Santa Cruz" approximately one year. I was responsible for bringing in the ship. Very often I would give directions for bringing in the ship. I used to holler down to the bridge and tell the Mate how the light bore or if passed such a point, perhaps I would tell him to keep off 2 or 3 miles until around such and such point. I wouldn't actually take the wheel and steer the boat myself, but that is practically the same advice I would have given if I were there in person. As

(Testimony of Robert Chester O'Brien.)

a matter of fact I cannot, and it is not often done, delegate that power or duty to the Purser or officer in charge of the cargo of the ship, to take the cargo list, health bills, manifest and things of that nature, ashore. The Purser makes up those papers. After the papers are signed they are in the Master's custody. After the Purser brings the papers to the Captain—the ship—the formality of entering and leaving port is called "Entrance and Clearance" and can only be done by the Master. The Master should go ashore with those papers himself in person. As to [27] whether it was required that he does go, or whether he should go or not. I can only say that a Master—it would be impossible for a Master to leave San Francisco unless he went in person to the Custom House. It evidently wasn't required that I go ashore in all ports with those papers, because I could not do it. I would simply write a little note to the ship's agent that I was feeling very bad, and ask him if he would mind coming out; instead of asking the purser to go ashore. There was objection on the part of the port officials to that method of procedure—as a matter of fact the papers were always accepted and my ship was cleared. I was on the "Santa Cruz" approximately one year when I was transferred. My wages I think were \$275.00 including board and lodging. During all of that time my wages were \$275.00 for approximately one year. I left the "Santa Cruz". I did not leave of my own accord—I was transferred. I was trans-

(Testimony of Robert Chester O'Brien.)

ferred to a freight vessel. I was on the SS "Cacique" to bring her North, then I was transferred to the ship I stayed on. I was on the "Cacique" perhaps six weeks. I was put on that ship to bring it North. I was transferred from the "Santa Cruz" to the "Cacique" to bring the ship to San Francisco. I brought the ship to San Francisco in good condition. I was transferred directly from the "Santa Cruz" to the "Cacique". That was in December of 1924. I then went to the "Rotarian". I went to the "Rotarian" perhaps—well as soon as I got to San Francisco; I came in in the morning and left in the afternoon. I was on the "Rotarian" until I resigned in 1927. I was on the "Rotarian" continuously from approximately—I cannot tell you. If I was on the "Rotarian" continuously from April 1925 until 1927—it refreshes my memory when it is stated that I resigned on June 12th 1927—then for two years and four months I was on the "Rotarian" continuously employed—if those other dates are the dates—I think those dates are correct. [28] The "Rotarian" is a freight vessel also known as the "Condor" engaged in the same trade, went into the same ports and performed the same duties. I think my salary on the "Rotarian" was the same, not more. I would say it was \$275.00 and found. I was paid that every month for two years—when ever that time is—two years and four months—all of the time I was in command of this vessel, barring just one instance—I remember of—I think it was

(Testimony of Robert Chester O'Brien.)

2 or 3 weeks when I was so bad I had to sign the log over. Got nervous and told the Mate to take it over. We logged it to that extent; he would be responsible for the couple or three weeks. I was on the vessel in bed and could not get out at all for a period of 2 or 3 weeks out of those 2 years and four months—that I was laid up. I was laid up for a period of 2 or 3 weeks of this particular period of 2 years and four months I was on the "Rotarian". I stayed on the vessel during the time—I was too bad at that time to give directions or anything. After I left the SS "Rotarian" in June of 1927, I went to the Marine Hospital. I have been Master of other vessels since I was Captain of the "Rotarian". I went—I was off for about a year I guess, then I tried once more—the "Silver Spruce" of the Kerr Line. I believe I got \$250.00 there; I am not sure of that, it may have been more. It would not have been \$300.00; I know I started with \$250.00 and I think they did increase it to \$275.00; that included my "found" as is the expression. I was on the "Silver Spruce" approximately 2 years going out to the Far East, as far as Calcutta, India.

There was then introduced in evidence the records of the Marine Hospital, which under stipulation of counsel of both sides were received by the Clerk marked Plaintiff's Exhibit 1 for identification.

I was on the "Silver Spruce" for approximately 2 years. [29] On those trips to the Far East it was

(Testimony of Robert Chester O'Brien.)

necessary that the ship be cleared at all ports and the proper manifests, crew lists, cargo lists, etc. be made out and signed by the Captain. They were as a matter of fact made out and signed by the Captain. On that particular ship I acted as my own purser, that was the only difference. The papers were properly signed and delivered. I delivered the papers myself on that ship for two years. I started at \$250.00 per month salary and I think it was increased to \$275.00—that might have been \$275.00 to \$300.00. I think that was the standard pay at that time on that trade—whatever the Standard Master pay in that trade was, I was getting. I testified that on the “Santa Cruz” I got approximately \$250.00 per month. Well I will stand corrected, if you have the record there. I was either getting \$275.00 on this—if it is of any importance at all—I think it was \$250.00 and \$25.00 uniform allowance, making a total of \$275.00. I am not sure if I was getting \$300.00 per month while on the “Santa Cruz”. My total pay might have been \$300.00—\$275.00 and \$25.00 uniform allowance. When I went on these boats which I have testified to—when I first went on them I did not start with a certain salary and have that salary increased. My salary was raised on one boat from \$250.00 to \$275.00. That is automatically done by the change in the scale of wages. In going to sea there is a certain definite scale of wages, whatever that scale is, you receive; an able seaman possibly would get \$35.00 on one trip and

(Testimony of Robert Chester O'Brien.)

if there were a new agreement he might get \$45.00 on the next trip, and vice versa, he might get \$45.00 and reduced to \$35.00. During the period commencing in February 1924 and ending in 1930, I tried out a trip to see whether I could manage it as second mate on a ship called the "West Cactus" to Cuba and back to San Francisco. I tried it out to see if I could manage to go to sea again. I went with a friend of mine. That was during the year I laid off, between 1927 and 1928. I was [30] on that boat from September 24, 1927 to December 8, 1927—4 months. I left that boat because I was let out on December 8, 1927. I sought re-employment at that time. I was employed as Master of the "Silver Spruce" on January 31, 1928. It was a different vessel, different companies, one had no connection with the other. From the period commencing February 2, 1924 down to February 26, 1930 I was not continuously employed. During that period of approximately 6 years from 1924 down to 1930 I was practically off almost a year between the "Silver Spruce" and the "Rotarian". During my trips to South America I went to the hospital in Callao, Antofagasta. I cannot remember the date I went to the hospital at Antofagasta. I could not tell you approximately. I think I was on the "Rotarian" at that time. I could not say whether I went to the hospital shortly after I joined the "Rotarian" or the next trip. It was within the first two trips. This trip usually took about four months for the round

(Testimony of Robert Chester O'Brien.)

trip counting from the Sound back to the Sound. I was in the hospital in Antofagasta sometime between February 11, 1925 and October 11, 1925. I cannot even approximate whether I was in the hospital around March or April or around in September or October. I was in the hospital at Antofagasta about two weeks I think. I went to the hospital in Calleo; I went up there for physic-therapy treatments, delaying us for about one week in port; that was while I was on the "Rotarian" also. I cannot tell you approximately when that was. I had medical treatments in so many ports that practically every doctor that came aboard the vessel would do something for me. I think the hospitalization in Callao was after the hospitalization in Antofagasta. In Antofagasta I received treatment—just rest for a nerve breakdown and knee; laid in bed. There were doctors in these hospitals. I had medical attention in both places. All of the mates on the vessels of which I was Master carried Master's certificates themselves. It is not necessarily a custom of the sea [31] that a man who holds one position, holds a ticket for a higher position, but usually. For instance the second mate usually has first mate's papers or a master's ticket; during the war that was not the case, that is the merchant vessel; on account of the shortage of the licensed officers. For instance on a ship of the class of the Leviathan or any of those vessels, they are all masters, even the fifth, sixth officers; usually on the passenger vessels all of the watch officers are licensed masters. On the boats of

(Testimony of Robert Chester O'Brien.)

which I was Captain I was usually certain to get a Master's mate always. In the clearing of a ship the Master always signed a statement to the effect that the crew or the ship is properly manned, properly stowed, and all parts seaworthy and ready for the voyage to be performed. When clearing from San Francisco, the Bill of Health, as it is known, is simply an affidavit from the Public Health Officer that at the time the vessel departed, that there is no contagious disease in the port that you leave. There is no affidavit made out by the Captain as to the health of his officers and men except as I explained. You simply make that blank, it is not an affidavit, you simply sign a form. Naturally if any man on the ship becomes disabled, you report him; there is no other one to report him. If any one of the men on the ship was disabled and was unable to carry on his duties, the Captain would be the only one to make the report; that does not include the Captain because the Captain is not one of the crew; nobody reports for the Master. The Captain does not have to report his condition to any one; let me explain that a man goes to sea—apprentice seaman, ordinary seaman, able bodied seaman, boatswain, 4th mate, 5th mate, mate, master, at that time it was assumed that he is mentally and physically able to be master of the vessel. There is never any examination attached to it. I remember appearing before the Board of Appeals in February 1932 before [32] the Veterans Bureau back in

(Testimony of Robert Chester O'Brien.)

Washington, D. C. I remember Mr. Hall, Liaison Representative of the American Red Cross was with me as my representative. My testimony was given under oath at that hearing. At that time I was asked to tell my story. At that hearing in response to the invitation to tell my story, I stated that the holding of a Master's ticket was 90% of the qualifications for being a Master Mariner. I would say that today. I don't remember if I said that the physical requirements of the job were practically nothing, but I would say it. If I were asked the question, I would say it now. The holding of a Master's ticket—that the physical qualities are much less than the requirement of holding a Master's certificate. If you have a ticket, you are not required to do much physical labor—that is the only examination physically that a Master takes after he has Master's papers, is his sight—for color blindness. Aside from that there is no more physical examination. Being a Master Mariner is the easiest job in the world under certain conditions. I do not know of any easier job.

Counsel for the Government then read into evidence parts of a letter purporting to have been written by the plaintiff to Hon. Hiram W. Johnson, which letter was quoted in a letter from Senator Hiram W. Johnson to the defendant's Veterans Bureau. Parts of this letter read as follows:

“I have always considered that this government insurance was an ample bonus for what

(Testimony of Robert Chester O'Brien.)

services I had rendered my country, and inasmuch as I have followed, without a day's illness, the same vocation and work in the Merchant Marine for which the Navy found me fitted to serve in time of war, that the cancellation of this policy in the face of the thorough explanations given the Veterans Bureau was unnecessary and unjust, and I cannot believe that a country founded on patriotism would snatch away its reward on a mere technicality."

The said letter is dated June 7, 1926 and the same further reads:

"I am at present at sea and as I am away from the United [33] States nine months of the year and am forced to take this means of asking your direct help. Shortly after the United States entered the war I offered my services as a navigator to the United States Navy. I was physically examined and found fit and was made a Lieutenant, Jr. Grade in the Reserve Force. I was later promoted to a Lieutenant and given command of the U. S. S. 'Mallard', and engaged in mine sweeping in the North Sea, and on my return was decorated with the United States Navy Cross for Distinguished Services. At the time I was commissioned I took advantage of my Government's insurance offer to the extent of \$10,000.00 and carried this insurance up to about one year ago, when, owing to the fact that my wife, the beneficiary of my policy,

(Testimony of Robert Chester O'Brien.)

and myself, were at sea, the monthly premium inadvertently was four or five days late arriving at Washington. As I understand the rules of the Veterans Bureau, this lapse could have been regulated without another physical examination within a period of three months, but as I had gone to South America it was impossible for me to accomplish the form required in time. However, this was fully explained to the Bureau, who insisted that rules could not be broken and that another physical examination was necessary. I took this examination in Tacoma last January, the first opportunity I had, and have been notified that my insurance has been cancelled owing to the fact that the physical examination disclosed a rapid heart, which the examining doctor noted as being probably caused by nervousness, and a slight trace of albumen in the urine."

The witness continued:

Well I could really say the same thing today. I have never been ill with any disease of any kind since I have been discharged from the Navy and what I meant in that letter and which I will say now, I have never been sick or ill of any disease or any trouble, excepting the trouble that I was discharged from the Navy with. I have never been down with sickness. Naturally it would be understood by the jury and everyone else that I was mak-

(Testimony of Robert Chester O'Brien.)

ing a desperate effort to save my insurance; but I did not lie; there is nothing in that letter that is not true.

The witness was then shown a letter dated Jan. 21, 1926 written on the stationery of the Grace Line SS "Rotarian", Tacoma, Washington.

That is my signature—I wrote that letter.

The letter read as follows:

"Veterans Bureau, Insurance Division,
Washington, D. C. [34]

Attention: Charles E. Mulhern:

Dear Sir:

Enclosed herewith report of Medical Examination for reinstatement of my insurance. Dr. Turner finds my heart rapid and accounts for it by nervousness. I have been in Puget Sound several days loading for South America and have lost considerable sleep in moving the ship from port to port, and I am positive that my heart action is normal under ordinary conditions, as I have never experienced any symptoms that would lead me to believe otherwise. I also was a little nervous in passing the examination as the loss of this insurance would be a great blow to me. I am leaving for South America in a day or two to return about mid-April and would like insurance changed to a straight life in the same amount. Naturally I will be unable to make application on regular

(Testimony of Robert Chester O'Brien.)

form and/or any other papers requiring my signature until my return, so, if possible, would like to authorize my wife's signature on the application form. My wife's address for the next three months will be 105-19 134th St., Richmond Hill, L. I., N. Y., to which address please send the findings of the enclosed application. I do not know just how much is due in premiums but am enclosing two months premiums on Term Insurance, and Mrs. O'Brien will make up any deficiency or payment necessary.

Respectfully,

R. C. O'BRIEN."

This letter was then received in evidence as DEFENDANT'S EXHIBIT No. 1.

The witness was then shown another letter written on the stationery of the Grace Line, SS "Rotarian" at Paíta, Peru, dated October 23, 1925.

This is my signature—I wrote that letter.

The letter was addressed to Mr. Charles E. Mulhern, Assistant Director, United States Veterans Bureau.

The witness then proceeded: Just one place I should have said I was in the same condition as I was when I was discharged from the Navy, which I repeatedly told.

The letter read as follows:

"My dear Sir:

My wife, with unselfish carelessness, has allowed my insurance to lapse, and after much

(Testimony of Robert Chester O'Brien.)

forwarding the enclosed form #742 has reached me here in Peru. I have just returned from ashore hoping to have found an American doctor in the oil fields, but without success, I find myself unable to have the form completely [35] filled out and am writing you trusting that an exception can be made in my case and my insurance placed in good standing as soon as possible. Callao, Lima and Valpariso are the only ports on the West Coast where an American doctor is available and as I am making none of these ports this voyage, I am naturally much disturbed over my wife being unprotected by my insurance pending my return to the United States the early part of next year. My vessel carries no doctor, in which case as Master I am also the ship's doctor and as evidence of my health I can only certify on honor that since September 1919 I have been actively engaged without a break as Master of vessels in foreign trade, and as far as I know, am in good health as at the time of my being commissioned in the Navy. During the war I was in command of the USS "Mallard" a North Sea mine sweeper and was decorated with the Navy Cross for distinguished service. I have never applied for, nor expect, any other bonus than this insurance and would keenly appreciate it if the lapse could be considered as of one month, the subsequent lapses being due to the fact of being out

(Testimony of Robert Chester O'Brien.)

of reach in a foreign country. If this application is favorably acted upon please notify my wife, otherwise please notify me in care of my company as per letterhead.

Respectfully,

R. C. O'BRIEN,
Master, SS Rotarian."

This letter was then introduced in evidence as DEFENDANT'S EXHIBIT No. 2.

The witness was then shown and he identified his signature on a paper entitled "Application for Reinstatement of yearly renewable term insurance." This was signed at Paits, Peru, October 22, 1925.

The witness proceeded: That is my signature, I actually made out that application.

This application was then introduced as DEFENDANT'S EXHIBIT No. 3 and read to the jury by counsel for the defendant.

The witness was then shown another application for reinstatement of insurance dated Feb. 8, 1926. Counsel for plaintiff objected to any part of the application except the part which was signed by the plaintiff, which objection the Court sustained. The Court then received in evidence the first page and the other side of the first page of the application, which parts of the application were received in evidence and the rest of the application was not [36] received in evidence. The part so introduced in evidence was identified and marked DEFENDANT'S EXHIBIT No. 4. The parts of the above

(Testimony of Robert Chester O'Brien.)

application received in evidence were then read to the jury by counsel for the defendant.

The witness then continued:

I have no idea where that was mailed from, or where I mailed that unless it is marked. I cannot say whether it was mailed approximately within a week or so of the date it was received in the Veterans Bureau; that is all according to where I was at the time. If I was in South America, naturally it would not be within a week; if in the United States, it would be. I do not know if this application was made out after the one just read (defendant's Exhibit 3). My present employment—the American Legion is giving me work up in the Veterans Building—Club Room up there. I just assist in the Club Room as best I can. There is two of us there. I am relieving a friend of mine who is the manager. He goes out of the room a great deal. I help to tend bar, sell cigarettes. I am usually sitting down at the time and then I am very happy to have the job, believe me. There is not any salary attached to the job. The commission varies, one month I did make a hundred dollars; another month I made sixty. This month I think it is eight something. I should say last month it was eighty something. I have had that work for the last five months.

The court then received in evidence without objection PLAINTIFF'S EXHIBIT NO. 9 showing the disability ratings given the plaintiff by the defendant's Veterans Bureau, which letter was intro-

(Testimony of Robert Chester O'Brien.)

duced in evidence for the sole purpose of proving that plaintiff had a compensable rating under Section 305 of the World War Veterans Act under plaintiff's second cause of action.

Regarding my income, this little work the American Legion [37] is giving me up in the Club, that is all. One month it was one hundred dollars.

Redirect Examination.

I was never given a physical examination in connection with any application that I made to be Master of any ship. When I stated that being a Master is an easy job, I mean it with qualifications. I believe a well man at sea in command of a passenger vessel has about as easy and pleasant a life as I know of, I did not consider that I was sick at the present time; I am not sick now. I am disabled but I haven't sickness. By that I mean, I am referring to contagious disease or an illness. The government were well aware of any trouble at the present time. I distinguish between illness and injury, that is what I mean, that I never had any illness, I was still plugging away at my job; that is the only thing I wrote them or intended to write them. On this form which counsel showed me which has been introduced me defendant's Exhibit No. 4, which is made out in typing, I possibly made it out myself, maybe the purser made it out. If I have signed it, whatever I have signed is perfectly all right, since the answers don't mean anything but what I would answer today. This present job which I have—this

(Testimony of Robert Chester O'Brien.)

position—of taking care of the club room for the American Legion—it does not cause me any great pain to do this work because I am sitting down and am more comfortable than I would be at home. Having a little occupation is good for me. I enjoy it. As a matter of fact the job is a charitable job. If I wasn't disabled I would not have it.

Regarding the circumstances of my leaving the Grace Line, the Grace Line told me they would give me one more trip. If I didn't improve I would have to quit.

Q. Improved in what way?

A. Nervous, irritability. I wasn't getting ashore to see [38] the agents; the agents had written lack of cooperation. They put it to me that I would either have to do my job, or get off the ship. I asked them to let me have one more trip and I tried it. When I got back they told me I was finished—I would resign. It was an understood thing if I didn't improve I would have to resign. I do not know that the company's agents in South America complained to the company about me; the only thing I know that from the talk I had with the General Manager that some one must have complained that I had not cooperated on the West Coast of South America.

As regards pain after the operation Dr. Linde performed, as far as my condition was manifested in my feelings, directly after the operation I felt better for perhaps 5 or 6 months. There was not

(Testimony of Robert Chester O'Brien.)

any pain there because there was not any feeling. My leg was perfectly numb but as the numbness wore away, the pain came back. I have got very little feeling between there and here now (indicating). At that time my ankle—the whole leg was so I couldn't feel anything. All I knew was that I was weak. Concerning the way I feel now compared to the way I felt prior to July 7, 1927, all my disability is something you can't define, when it started or when it stopped. It has been a constantly growing thing since the day I was discharged from the Navy. I can't say definitely on such a date it was this or that. Taking the spring of 1927 and regarding whether I am worse now, or better now, or about the same as in the spring of 1927—in the spring of 1927 I was still trying to work, so I couldn't be as bad as it is now. I have lost all hold of myself. I couldn't try to work. At that time I had enough nerve to tackle it. Regarding my leg condition now compared to then, my leg if I could explain—I was able at that time to throw the cane away and make myself walk; I could almost hide my limp, in fact I had to on many occasions, I can't do it any more now. It was necessary for me to have had the Mates perform my duties for me. Regarding what would happen if the Mates had not performed my duties [39] for me—if those mates to whom I delegated my duties which I said I would have performed—would not have performed them, would I have been able, even suffering pain, to have done them—well if

(Testimony of Robert Chester O'Brien.)

you will bear with me just a moment your Honor, I would like to explain that question—yesterday I was asked what the main duties of a Ship Master was: I would say the greatest duty of a Ship Master is to be prepared for an emergency, such as a collision or fire or accident at sea, of some kind. I was never prepared for that emergency. I just would have to hope that it would never happen. The navigating of a vessel between here and Honolulu for instance—it would not make any difference if the Master left the ship, after the pilot left the ship, the ship would go to Honolulu; in other words, the first mate could take the ship to Honolulu.

The COURT: The question is not relative to that; the question is would you have been able, not if some one else was able?

A. No. I could not have gone out and done those duties which I picked some one else to do in my place. I would not have asked them had I been able to. Regarding the practice at sea, for instance a man is sick, he receives wages while on the voyage just the same. A man can go on a six months' voyage, get sick at sea and never turn to.

Recross Examination.

I just testified that I could not carry on with the Grace Line any more. After I left the Grace Line I laid off a year and then tackled the "Silver Spruce". After I left the Grace Line was not the end of my sea-going experience—I made one more effort. After I left the Grace Line I made four trips of six months each.

TESTIMONY OF JOSE FERRERIA,
FOR PLAINTIFF. [40]

Jose Ferreria, called as a witness in behalf of the plaintiff, being first duly sworn, testified on

Direct Examination:

I am General Foreman for the Schirmer Stevedore Co. and have known Captain O'Brien since he was on the "Silver Spruce". I used to meet the Captain every time his ship came in and I saw him limp from the first time I met him. On some trips he would be laying in bed and he couldn't get up because his leg was all swollen. The Captain could not accompany me down into the hold to see if the cargo was stowed properly. I would go myself and he would ask me if things were okeh. In every other case I have seen the Captain come down and view the stowage. Most of the time Captain O'Brien couldn't get down in the hold to view the stowage on the "Silver Spruce". He was supposed to go down every time but I will say he went down maybe once or twice. I should judge the ship was in about every four months for a period of two years and that out of six times he went down about twice. The other times he would look from the deck as far as he could.

Cross Examination.

My impression was that the Captain brought the "Silver Spruce" in about eight or nine times. I know that on some ships it is customary for the first mate to superintend the stowage of cargo along with the stevedore boss.

TESTIMONY OF ALFRED O. ARSENEAU.
FOR PLAINTIFF.

Alfred O. Arseneau, called as a witness in behalf of the plaintiff, being first duly sworn, testified:

I am Manager of the Foreign and Domestic Trade Department of the Oakland Chamber of Commerce and have known Captain O'Brien since February, 1924. I was Purser of the "Santa Cruz" when Captain O'Brien took command of it, and served under him approximately [41] eleven months. During that time I noticed that he was lame and moved about the vessel with some difficulty. I have not noticed any great change in his limping since that time. He might limp a little more now than he did when I first met him. I have observed him sick in his bed aboard ship probably four or five times. During the time that I was on the "Santa Cruz" I had to look after the Clearance and Entrance papers, go to the Consul, to the Agents, and look after the cargo; things that had formerly been done by the previous captains I had sailed with. Captain O'Brien never performed these duties while I was on the ship. Only on rare occasions have I done these things for other captains under whom I have served.

Cross Examination.

I was used as a check on the Chief Officer for the stowage of cargo. The Captain asked me to do that because he wasn't able to do it. The making up of the manifests, crew lists, health bills, is the duty of the Purser's Department. They are actually made out by the freight clerk and it is the duty of

(Testimony of Alfred O. Arseneau.)

the captain to see that they are presented to the Consul and the papers should be signed at the Consulate. Captain O'Brien never signed these papers at the Consulate. I would bring the papers back to have the Captain sign them and in some cases the Consul would bring the register aboard to have it signed. The formalities of entering and leaving port were completed upon the captain doing this. I never heard of any objection on the part of the port officials to that procedure.

Mr. LYNCH: Q. In other words, although you were used to a certain method of carrying on your ship's business as Purser, it was possible to deviate from that as long as the papers were properly signed, is that correct?

A. Yes, sir.

Q. The captain is responsible for everything that goes [42] on on a ship and it is in his power to delegate any of his duties to you? In other words he can say to you "Now, Mr. Arseneau, you take these ashore and have them signed"; and that thereupon becomes your duty?

A. That is true subject to orders from the Company. I had certain duties I had to perform on board of the vessel that I wasn't able to perform because of the necessity of going ashore for the Captain.

Q. But as a matter of fact, once you get out to sea, the captain is absolute master of the vessel?

A. Yes, sir.

(Testimony of Alfred O. Arseneau.)

In foreign ports a form must be filled out or signed by the master of the vessel wherein he certifies that all his officers and crew are in good health and able properly to carry out their duties. This form was signed by the Captain in all cases.

Mr. GERLACK. No further questions. If Your Honor, please, we offer in evidence at this time various physical examinations that have been made of Mr. O'Brien which Mr. Blake has handed me from the Veterans Bureau file. Mr. Lynch, it is stipulated that these are the various physical examinations made of Captain O'Brien at various Government Hospitals by the Veterans Bureau and were taken from the official file.

Mr. LYNCH: Yes.

The COURT: They may be received as Plaintiff's Exhibit No. 6 in evidence.

Redirect Examination.

About a month after Captain O'Brien had been on board I noticed he was very nervous and irritable and he got worse as time went on. He used to get me out of bed at all hours of the night. [43] I would go up to his room and find him in bed and he would appear to be in pain. I would sit down there and talk to him for a while until he would go to sleep. Sometimes I would call the Chief Steward to give him medical treatment. I have seen the Steward give him medicine. The Captain would sometimes rub his leg when I was in the room with

(Testimony of Alfred O. Arseneau.)

him. The "Santa Cruz" did not carry a physician and any medical service required was performed by the Chief Steward. During the eleven months that I was on the "Santa Cruz" with Captain O'Brien he would call me up to his room anywhere from three to five times a week. In January or February of 1925 we were on the "Cacique" and the Captain didn't have a meal down in the saloon as well as I can remember on the whole trip coming back to San Francisco. He became so irritable and so hard to get along with that when he asked myself and the rest of the officers to accompany him to the other vessel I found a reason for not going and got him to send a radio to San Francisco to relieve me from being transferred with him. I believe the Captain is more nervous than he was then.

Recross Examination.

I don't recall that at any time when I was with Captain O'Brien he sought hospital treatment in any South American port. I don't recall that the Captain ever asked me to secure a doctor for him at any port. There is no regulation saying the Captain must have his meals in the dining saloon but I know he preferred to eat with us rather than eat alone by himself. I went up several times to eat with him and I know he didn't do it by choice, but by necessity, being unable to go down to the dining room.

(Treasury Decision #20 offered in evidence and received as "PLAINTIFF'S EXHIBIT #7").

TESTIMONY OF DR. FREDERICK G. LINDE
FOR THE PLAINTIFF. [44]

Dr. Frederick G. Linde called on behalf of the plaintiff, after being sworn, testified as follows:

Direct Examination.

I am a physician and surgeon practicing in this city. I graduated from the University of California in 1916 and have specialized in orthopedic surgery. At the present time I am on the teaching staff of the University of California and visiting orthopedic surgeon at the San Francisco Hospital and also on the consultant staff of the Shrine Hospital. I served in the Medical Department of the Navy during the World War. I am the recipient of the Navy Cross.

I examined Captain O'Brien in April of 1930, at which time he came to me for consultation and advice in reference to his right leg and knee joint. I found upon examination a badly diseased knee joint and that the lining of the joint was partly destroyed. The motion of the knee joint was definitely limited. There was obvious deformity of the joint consisting of a rather marked swelling, old scars, evidencing previous injury of the knee. The X-ray examination showed rather marked destruction of the cartilage of the joint, with numerous loose sections of pieces of bone in the cartilaginous lining in the joint. There was considerable overgrowth of the normal contour of the bones. The examination showed a distinct grating of the joint to palpitation, sensitiveness to touch and extreme of motion elicited rather marked pain and there

(Testimony of Dr. Frederick G. Linde.)

was a sensation on motion of the joint as though the joint was creaking, ratchety, catching, at certain locations. I advised an operation on this joint to remove, as far as possible, these obstructions, and to endeavor to get a painless knee. This operation was performed in May, 1930, at which time the joint was exposed and found to be badly diseased in that the whole lining of the joint was studded with [45] cartilaginous bodies; the pouch above the knee, which is normally filled with lubricating fluid, I might say was obliterated; there were several loose pieces of cartilage of bone within the joint, and one particularly large in the lining below the patella or knee-cap, which was removed. The entire lining of the joint was removed together with these obvious loose bodies of cartilage. This is done in this type of case so that after the operation a new lining will grow in part, and is done to eliminate the element of locking and consequent pain. The Captain made a fair post operative recovery and I saw him subsequently three or four months thereafter. He had some improvement to the extent that his pain was lessened but he still had rather marked limitation of motion and his pain wasn't entirely eliminated. The photographs which have been introduced as "Plaintiff's Exhibit #3" are good photographs of this condition.

At the time I observed and treated Captain O'Brien in 1930 I certainly believe he was permanently and totally disabled within the purview of

(Testimony of Dr. Frederick G. Linde.)

the definition which has been introduced as "Plaintiff's Exhibit #7". I do not believe he can follow any vocation to make a livelihood. I base this answer on the knee condition and his mental and nervous condition. Captain O'Brien was suffering considerable pain at the time I examined him and this was to a large extent relieved by the operation. There was undoubtedly damage done to the nerves of the knee.

(Records of the Marine Hospital offered and admitted as "PLAINTIFF'S EXHIBIT #8").

At the time I examined Captain O'Brien in 1930 it is my opinion that his condition was of many years standing.

(Counsel for plaintiff then read to witness from "Plaintiff's Exhibit #8", Records of the Marine Hospital in San Francisco). [46]

Dr. Linde testified that the X-ray conclusions as shown in that report showed the same condition that he had described—the knee joint badly diseased, with many loose pieces of bone and cartilage within the joint with the destruction of the articular or gliding part of the cartilage).

Dr. Linde continuing:

In my opinion the condition that I first saw in 1930 was of many years standing. It very well could date from the injury he received while in the Service. You could trace it back easily to that period. Osteomyelitis is infection of the bone itself,—

(Testimony of Dr. Frederick G. Linde.)
of any bone. It is notoriously incurable, in that we say in a more or less facetious manner—once an osteomyelitis case, always an osteomyelitis case. I have seen it come back as soon as 27 days after the original operation. I did not find an osteomyelitis condition because I didn't explore the bone and I am not able to tell from the photographs if such a condition was present.

(Plaintiff's counsel read from "Exhibit 5"—Abstract of the Navy Report furnished by the Secretary of the Navy).

Q. What is "cellulitis", Doctor?

A. Infection of the tissues overlying the bone, the soft tissues under the skin.

Q. What is the meaning of "fascia", Doctor?

A. Fascia is the muscle tissues; it is the covering of the muscles.

Q. What are "tendons"?

A. Tendons are the ends of the muscles which are attached to the bones.

Q. What is the meaning of "atrophy", Doctor?

A. Atrophy means shrinkage of the tissues of the muscles from previous injury or disuse. [47]

Q. What does "crepitus" mean, Doctor?

A. Crepitus is the grating sensation I described, on palpitation.

(Testimony of Dr. Frederick G. Linde.)

The statement in that examination "there is apparently a backward displacement of head of tibia with loose cartilage" means that the upper end of the leg bone had slipped behind, or slightly behind the lower end of the thigh bone, a partial dislocation. I do not agree with the opinion of this record that the present condition was caused by the 1916 explosion. It is difficult to say if it was caused by the mine explosion in 1919. In that report the physician noted on enlistment R. 18/20, L 18/20, and 20/20 is perfect vision. If at the time of O'Brien's enlistment the "physical defects noted at enlistment" were merely noted to be about his eyesight and tonsils slightly enlarged, it would indicate to me no trouble was noted on his leg. They were pretty rigid on enrollment.

Referring to the medical report made at the United States Naval Hospital, Mare Island, California, September 2, 1930, the term psychasthenia used in that report means some nervous trouble. Arterial hypertension refers to high blood pressure and myocardial insufficiency is a weakness of the heart muscle. That particular examination was made after I had operated on Captain O'Brien.

Referring to the neuropsychiatric examination made by Dr. J. M. Wheate at the San Francisco Regional Office of the Veterans Bureau on August 16, 1930, the term "tachycardia" means a rapid heart. I believe that the type of infection which I found in O'Brien's knee at the time of my examina-

(Testimony of Dr. Frederick G. Linde.)
tion could be a contributory cause of his present heart trouble.

It is possible. In other words the poison from the infected knee gets into the system and poisons the heart through that channel.

Referring to the examination dated August 5, 1930 by Dr. [48] E. E. Hobby, the conclusion in that examination "the patella is ankylosed, the knee can be extended only to 130 degrees" means that the patella is immovable. The fact that an osteomyelitis is apparently quiescent, as it was in 1930, does not mean that it is cured. There is always a probability of it recurring.

The gluteal region as mentioned in the report dated December 19, 1932, refers to the buttocks. Emphysema refers to a condition of the lungs where the air cells are slightly enlarged from coughing, and where it states there is an area of anesthesia in relation to the scar below the right knee, that represents section of cutaneous nerve supply", it is meant that there is a numb area in the knee which has followed the cutting of some of the nerves in the skin.

I have heard all of the medical reports read and they are in the main consistent with my finding as made in 1930, and if those reports are correct, I don't think I would vary the testimony which I have already given as to the total and permanent disability of the plaintiff. I could not trace the disability back any particular number of years but

(Testimony of Dr. Frederick G. Linde.)

I know it has been of long standing, and believing as I do the history that he received an injury during the period of the War in the way it has been indicated by the records, I think the injury can be very properly traced back to that time.

Cross Examination

I examined Mr. O'Brien in April of 1930. I took a history at that time. I haven't the history with me but I recall that some time in 1911, '12 or '13, I have forgotten just which, he had a fracture of the leg, the right leg below the knee, that it had drained for some time, healed, then had become a useful member, but on two occasions he had, during the war, subsequently injured that leg. Following that time he sustained some disability. Four [49] years before I saw him and the leg had begun to stiffen up materially and two years later he was hospitalized. With increasing disability throughout this time he finally could not perform any of the duties at sea and he wanted help. At that time I had a consultation with my associates, Dr. Bowl and Dr. Pruett, and we decided it would be a good chance of giving Captain O'Brien a painless knee or minimize the pain by an operation such as I have described. That operation was performed in May, 1930. At the time of the operation I examined his heart and lungs and found no condition which would lead me to fear that giving him an anaesthetic would perhaps be fatal. I have never seen a knee that was as badly diseased by this particular condition as was

(Testimony of Dr. Frederick G. Linde.)

Captain O'Brien's. The operation that I performed temporarily improved the knee. It is true that an operation could be performed on the knee whereby it would be ankylosed and the only lessening of function would be the fact that the man would have a stiff leg. There is no pain in an immovable joint. I believe it is possible this could be done to Captain O'Brien's knee at the present time. However I believe that the osteomyelitis which has been lying latent in the upper part of the bone just below the knee is very apt to be stirred up by the operation, which would likely lower the resistance of that bone; there is a possibility of there being a serious infection. It is also possible, but not probable, that the osteomyelitis may remain quiescent for the rest of his life.

Q. Do you understand the definition of permanent and total disability? With the permission of the Court, I would like to read the definition of permanent and total disability.

The COURT: Certainly, read it to him.

Mr. LYNCH: The definition goes this way: I will read the whole definition: "Any impairment of mind or body which renders [50] it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed to be total disability. 'Total disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suf-

(Testimony of Dr. Frederick G. Linde.)

fering from it. Under that definition, was he permanently and totally disabled?

A. Very positively.

Q. Doctor, let me ask you this: If an operation such as we discussed a little while ago, that is, if the knee joint were ankylosed, wouldn't it be possible for the man to carry on numerous occupations in that condition?

A. Depending entirely upon the knee, yes.

Q. Do you know of people who are in that position and who are performing their daily tasks?

A. Yes.

Q. Doctor let me ask you this: In giving your opinion as to permanent and total disability, I would ask you if you are bearing in mind the fact that the definition does not mean to convey the fact that a man must carry on his former occupation?

A. I appreciate that.

Q. But any occupation: the definition doesn't specify any particular occupation, it says "any occupation".

A. Yes.

Q. But you do believe that a man with an ankylosed knee joint could properly carry on a number of occupations?

A. Yes, if that is his only disability.

Q. Doctor, now you have stated that it is possible that the knee joint can be ankylosed and the leg stiffened and much of the pain, as a matter of fact, all of the pain removed and the [51] man

(Testimony of Dr. Frederick G. Linde.)

could be able to carry on some occupation, is that correct?

A. As far as the knee goes, yes.

Q. That is the only thing we are concerned with?

A. Yes.

Q. Then bearing that in mind Doctor, how do you reconcile the fact that you consider the man permanently and totally disabled, when, as a matter of fact, you stated an operation could be performed on his knee which would enable him to carry on some sort of occupation?

A. His knee condition is not his whole picture with me. I mean there are other factors which enter into his disability which are not referable to the knee.

Q. Doctor, I'll ask you if that knee condition could be corrected by an operation of that sort?

The COURT: No, I think you don't understand the witness. In answering the questions of the Court, he said that he didn't base his total disability upon his knee alone, but upon the mental condition, and I think the Doctor is not quite answering you in a way so as to give you that view, as if you had asked the question to develop if that is so or not.

A. That is correct, Doctor?

Q. In other words, you feel that it is the combination of the knee trouble with the other, the mental psychiatric issue, which makes him totally disabled.

(Testimony of Dr. Frederick G. Linde.)

A. I think it is very obvious.

Q. Doctor, did you take that history into consideration when you gave as your opinion here that the man was permanently and totally disabled as far back as 1925?

A. Yes.

Q. Are you still of that same opinion? [52]

A. Yes.

Q. Doctor, confining your answer to the knee injury only and going by your examination, would you say that this man was permanently disabled and unable to follow any occupation as far back as 1925?

A. I should.

Q. That is based on our examination.

A. Yes.

Q. Of his knee?

A. Yes.

Q. Doctor in addition to the knee injury, what else did you say you found?

A. I found that it was obvious that Captain O'Brien was not particularly,—was not particularly in an equable state of mind. I mean he appeared to be nervous, which was quite obvious.

Q. Doctor in giving your answer as to permanent and total disability, are you basing that on the testimony that you heard here in Court and the facts that have been related?

A. No: on the examination of the patient and the condition I found his knee in at the time of the operation.

(Testimony of Dr. Frederick G. Linde.)

Q. Doctor, would you say that the man, who, by his own statement to you, did not begin to have this leg stiffen on him until 1926 or 1927, was permanently and totally disabled in 1925?

A. If that were the only complaint made with reference to the knee I shouldn't of course.

Q. Going on that presumption, he made a statement on his knee as far back as 1912, would you say he was permanently and totally disabled in 1912?

A. No, because he also stated to me that he had recovered sufficiently from that to resume his ordinary activities.

Q. Well, if it were shown to you, Doctor, that the man resumed his ordinary activities and continued at substantial salaries down [53] thru all of the years and up as far as 1930, all that time at his chosen calling, would you say that he was permanently and totally disabled back in 1925 when, as a matter of fact, he worked 5 or 6 years after that?

A. No: if it were shown to me that he continued to do all his duties, I should not consider him totally disabled.

Redirect Examination.

If it were shown to me that approximately fifty per cent of his duties were performed by his fellow employees, I should say that he was permanently and totally disabled and in my opinion it was extremely deleterious to Captain O'Brien's health for him to do any work because he had a badly diseased

(Testimony of Dr. Frederick G. Linde.)

knee and any motion of any weight bearing would certainly aggravate the condition of his knee and produce rather marked pain. If he worked, it was against competent medical advice and such work would certainly retard cure of his leg and possibly make it impossible of cure. It is undoubtedly true that the patient would be better off if his knee would be made rigid and stiff, but in this particular case I think it would be extremely hazardous to attempt such an operation on that knee because of the possibility of lighting up the osteomyelitis and endangering his life very definitely. An osteomyelitis infection poisons the whole system.

Recross Examination.

Mr. LYNCH. Q. Doctor, when you examined Mr. O'Brien did he have any osteomyelitis?

A. Not by clinical examination, but by X-ray examination you could readily ascertain that there had been osteomyelitis in the upper end of the tibia.

Q. Did you make that X-ray examination? [54]

A. Yes, I made an X-ray examination.

TESTIMONY OF ERNEST A. PETER.

Ernest A. Peter, called on behalf of the plaintiff, being first duly sworn, testified as follows:

I am a master mariner and served with Captain O'Brien on the "Silver Spruce" from about June, 1927 to October, 1928. I acted as first and second

(Testimony of Ernest A. Peter.)

mate but at the time had master's papers. During this period I noticed that Captain O'Brien had difficulty getting around. He was lame and limped and he wasn't on the bridge very frequently when he should have been there. He was very irritable and nervous and he couldn't sleep at nights. I had the twelve midnight at 4:00 A. M. watch and practically every night the Captain would ask me to come down to his room and I would find him awake and nervous. I took charge of the ship on one occasion in leaving Calcutta because the port authorities refused to give clearance unless I was in full command. I navigated it from Calcutta about two days and then the Captain took charge again. On one other occasion I took the ship from San Francisco to Los Angeles and San Pedro and upon arrival at San Pedro the Captain resumed command. While I was navigating the ship he was in his room in bed. I would say that during the time I was on the "Silver Spruce" the captain performed all of the services that a Captain should have performed, about one-half of the time, the other half of his duties were performed by members of the crew.

Cross Examination.

I held a master's certificate while I was on the "Silver Spruce". It is practically required that you have such papers in order to hold a mate's job. The Captain is the absolute master of the boat, and within reason he can order a man to do any-

(Testimony of Ernest A. Peter.)

thing he wants to, such as telling the first mate to superintend the stowage [55] of cargo or he can delegate the purser to take the papers ashore to be signed, and if the Captain decided that he wanted so, as first mate, to take the ship in or out of port, he is entitled to give those orders although it is his responsibility.

Q. Well then, in view of that, would you say that Captain O'Brien was acting entirely within his rights when he asked any of the other officers to do his work?

A. It is not a question of that. The Captain was ill. The Captain could delegate to me any particular duty on any occasion. It is customary on most ships to delegate the various duties, such as the stowage of cargo, navigation, etc., to the various officers on the boat and the Captain is in general supervision over the whole thing. The trip on which I assumed command going out of Calcutta was about November, 1927 and the occasion of my taking the ship from San Francisco to San Pedro was on my last trip in October of 1928.

Redirect Examination.

It is not usual for a Captain to delegate to one of his mates the authority to bring a ship into port. It is invariably brought out and in by the Captain with the assistance of the pilot.

Captain O'Brien took the ship in and out of port on all occasions while I was serving under him with the exception of that time in Calcutta and the other time from San Francisco to San Pedro.

TESTIMONY OF DR. E. E. HOBBY.

Dr. E. E. Hobby, called on behalf of the plaintiff, being first duly sworn, testified as follows:

I am a physician and surgeon employed by the United States Veterans Bureau. At the present time I am on an administrative furlough. I have been present and heard all [56] the testimony and this examination report dated August 5, 1930, is my examination which I made in the regular course of my employment as physician and surgeon of the Veterans Bureau. I think I examined Captain O'Brien twice and it is my opinion that he was totally and permanently disabled, *with* the purview of the definition which has been read, when I examined him on August 5, 1930. Accepting as true the statements made by the plaintiff in this case and taking the observation which I made myself, it is my opinion that this condition has existed since April 1, 1925, and I feel that the condition is likely to continue.

Q. Then, summing it up, you are of the opinion, if these statements and this evidence is true, that he has been permanently and totally disabled ever since April 1st, 1925?

A. I think so.

Q. Do you believe that at that time it was reasonably probable that his disabilities would last throughout his lifetime?

A. You mean when I last examined him?

Q. No, from April 1st, 1925, if these facts are true?

A. Yes.

(Testimony of Dr. E. E. Hobby.)

The COURT: In other words whether it is a permanent disability?

A. Yes; in conjunction with what I have seen since then.

Cross Examination.

I examined Captain O'Brien in 1930 and also in 1933. The first time I examined him I did not take a history but relied on the records of former examinations. O'Brien complained to me of stiffness of his knee and a painful knee, especially painful on any manipulation.

Q. Were there any other complaints?

A. I don't know as he made any other complaints at that time to me. [57]

Q. Wasn't it customary to ask a man being examined if he had any other complaint?

A. I always ask him if he complains of anything else, but my special examination has to do with the orthopedic examination, and the surgical complaints,—usually those things are taken up by the other examiners: I didn't go into them. In 1933 he also complained of extreme nervousness. I think I observed this at the first examination but I made no note of it at that time. My diagnosis was made in conjunction with an X-ray examination and I found that he had a compound fracture of the right tibia and osteomyelitis, the osteomyelitis having been healed and the fracture united, with adherent scar; he also had ankylosis, which was partial, right knee, following his operation for chronic synovitis and arthritis, secondary to the fracture and osteo-

(Testimony of Dr. E. E. Hobby.)

myelitis of the tibia. I don't know of any cases which are supposed to be as severe as this one, in which men are going about doing their daily business, actually earning a living. His knee in the present condition is one of the most painful of knees that we have. If made stiff by an operation, he would probably be relieved of his pain but he would have a stiff knee. This doesn't always happen but I expect that such an operation would relieve it. There are lots of people who are going about in the condition such as we have just described, namely, with a stiff knee, and these people have adapted themselves to earning a living.

The COURT: Q. Do you feel he is permanently and totally disabled, taking the knee condition alone, into consideration?

A. No, I don't think the knee condition alone; but I think the knee condition together with his age and the fact that he has always followed the profession of a seaman, renders him permanently and totally disabled for his profession or any other [58] thing that he might take up at his age.

Q. The only element you are taking into consideration, Doctor Hobby, is the fact of his knee condition: That is the only thing that you are weighing for the purpose of making the statement that he is permanently and totally disabled?

A. I am weighing that especially, but I am also weighing the fact that the last examination that I made and the times that I have seen him since he has exhibited very marked nervous disturbance.

(Testimony of Dr. E. E. Hobby.)

The COURT: I see. Q. Let me ask you this question: If his knee condition was cleared up, as far as the pain goes: in other words, there is a suggestion here that the knee could be fixed in such a way that it would be immovable, the pain would cease down there,—the irritating conditions would cease: if that were relieved and that pain which you feel he endures now whenever he attempts to walk and possibly when he is sitting,—if that were taken away, would his mental condition clear up?

A. I don't believe his mental condition is entirely due to the knee.

Q. You think the knee is simply something that aggravates it?

A. It aggravates it, yes.

Mr. LYNCH: Q. But you do believe, Doctor, that the ankylosing of this knee, as it is called, would, in some manner, lessen the mental disorder if there is any?

A. It might.

Q. Let me ask you this question, Doctor: Now, in view of the testimony you have just given, stating that the operation performed upon the man's knee and bearing in mind the fact that you knew people going about in that condition,—do you still think the man is permanently disabled? [59]

A. Yes, I think he is.

The COURT: He has answered counsel. You see in making that conclusion he has taken into consideration, just like the last Doctor, the nervous condition, which he feels would not be cleared up

(Testimony of Dr. E. E. Hobby.)

by the operation, according to his testimony. That is what you are facing in the testimony of this witness.

Mr. LYNCH: But he has testified he does feel the mental condition would be somewhat cleared up.

The COURT: Yes. In other words I don't want to argue. I am trying to assist you so that you can examine him on the point in question. He says that the condition of the leg aggravates the mental condition; but the mental condition alone apparently would be sufficient to disqualify him; that is your testimony isn't it?

A. I believe that is true.

The COURT: That's the way I understood your testimony.

Mr. LYNCH: Q. Doctor, in testifying the way you have you are having in mind the man's pre-war occupation as a sea captain, have you not?

A. Yes, I have that in mind.

Q. Do you think these disabilities which are alleged will prevent him from carrying on any gainful occupation?

A. I don't think a man of his age and after doing one particular kind of work all his life can adapt himself to anything whereby he would be able again to earn a livelihood. I would say that he was not totally and permanently disabled if at the present time he is earning a livelihood. It is true that during the period which I have covered from 1925 to 1930 he was earning a living at an average rate of Three Hundred (\$300.00) Dollars

(Testimony of Dr. E. E. Hobby.)

per month, but he was breaking down all the time. The time would [60] come sooner or later with the progressive condition of his knee and his nervous condition, when he would have to give up.

Q. Yes.

A. I think his condition is worse now than it was before the knee was operated on.

Q. You think it is progressively getting worse?

A. I think he has a very bad result from his operation.

A. I am not qualified to speak on mental conditions, but he was very emotionally disturbed at the time I saw him.

Q. When was this, Doctor?

A. At the time I made my examination in 1933.

Q. But that wasn't in 1925?

A. I don't know his mental condition in 1925.

Q. Would you say, Doctor, that the operation that Doctor Linde performed made his condition any worse, or improved it?

A. He tells me and I have no reason to disbelieve what he says, that his pain has been relieved. A certain kind of pain has been relieved, I believe, but he still has a very painful knee. Aside from the relief of the pain as a result of the foreign bodies in the knee which cause extreme pain at times, I think the knee is in worse shape than it was before it was operated on. If the knee was ankylosed at the present time he would not have the pain that he has now as a result of a little extreme movement of the knee. Any undue movement of the knee

(Testimony of Dr. E. E. Hobby.)

causes great pain with him. That would be relieved because the knee would be immovable. This is not an uncommon operation but I think he would still have pain on various occasions, the result of the damage to the bone.

Redirect Examination.

Even though the knee were stiffened by the operation known as an ankylosis and the operation were successful, and infection did not light up at the time and it healed well, I [61] would say that there would still be a possibility of its lighting up at some future time. There is always a possibility that the osteomyelitis may break out again at any time with his heart condition, hypertension, high blood pressure, it would be more dangerous for him to undergo an operation than for one who didn't have such a condition. There is no question but that Captain O'Brien has had osteomyelitis and as treatment for this condition rest is a very important element and free drainage, plenty of time to let the process heal itself. A person with osteomyelitis should refrain from working and rest as much as possible. I have known of many cases who have gone about on their feet with chronic osteomyelitis.

Q. What happens when they do that?

A. They just have that aggravated condition going on all of the time.

Q. What would you say about the nervous condition? Would working and being about on this leg aggravate his nervous condition?

A. It would aggravate it.

(Testimony of Dr. E. E. Hobby.)

Recross Examination.

I did not find any active osteomyelitic condition in Captain O'Brien. I only found the remains of an old osteomyelitis. It is true that a man suffering from a healed osteomyelitic condition can continue on a certain type of work and can do it indefinitely. There is a possibility that it may light up. In a well healed condition it is possible but not probable.

DEPOSITION OF BARNEY MAGNUSON.

The deposition of Barney Magnuson, a witness for the plaintiff, was read in evidence and the same reads as follows:

I am Chief Engineer of the Steamship "Santa Monica". [62] I first met Captain O'Brien July 13, 1928, when I was First Assistant Engineer on the "Silver Spruce" and he was Captain. I made two trips with him to India and to Java. During that time Captain O'Brien was not physically well. There was something wrong with the right knee. He always used a cane and often times was confined to his bed for several days. I would confer every day with Captain O'Brien regarding the business of the ship, such as the speed, repair work to be carried on, etc. I would go to his office, as was customary, except when he was confined to bed, and he would then refer me to the mates. He also seemed to be very nervous and irritable and this condition was noticeable all the time I sailed with him. On one occasion I saw his leg and noticed

(Deposition of Barney Magnuson.)

that the kneecap was swollen to about twice its normal size. I would say that during the time I knew Captain O'Brien on the ship his services as Captain were unsatisfactory. He was incapable of performing his duties. I was called upon to do some of the work he should have supervised as Captain. In one instance in a storm in mid-Pacific we had a following sea, in other words the sea was following us; we were going in the same direction. It was coming up on deck. We had a storm door but the storm door was down. The seas got so big and it was after dark and we could not get the door on. So I went to Captain O'Brien and he asked me what I could do. I told him I would see what I could do about getting the doors on, so the First Assistant and I went down with chain blocks and managed to pull the doors down and secure them. It was the Captain's duty to supervise that. The Captain was sick in bed. During these two cruises he spent an average of 3 or 4 days a week in bed, that was the average during all of that time. I am familiar with the duties of a Sea Captain. I have followed the sea 15 years. [63] Generally speaking I would say the character of Captain O'Brien's services as master of the ship, on these two trips, was unsatisfactory.

Cross Examination

My acquaintance with Captain O'Brien covers the period between July 13, 1928 and September 18, 1929. During all that time he was master of the "Silver Spruce". Each of the two trips which we

(Deposition of Barney Magnuson.)

made took from five to six months and I have not seen Captain O'Brien since I left the boat.

As Chief Engineer I was in complete charge of the engine-room and engine-room crew.

Q. In case of a storm is it the duty of the captain to make fast a storm door?

A. Not exactly to make it fast. It is his duty to see that the doors are made fast and secured properly.

Q. And he asked you to see that that was done?

A. Yes.

Q. And you did that on the occasion you just told us about?

A. Yes.

Q. You saw that the doors were made fast at that time?

A. Yes. It is a fact that the Captain is the executive officer of the ship and he is the man who is responsible to the owners of the vessel for safe cargo and the vessel for the particular voyage for which he is engaged.

Q. Both of the voyages you sailed with Captain O'Brien were safe voyages were they?

A. Yes.

Q. And all the duties of the Captain of the "Silver Spruce" were discharged and the boat brought into port properly and safely? [64]

A. Yes.

Q. And you came into port safely?

A. Yes.

(Deposition of Barney Magnuson.)

It is customary for the Chief Engineer to report daily to the master of the vessel, if it is anything out of the ordinary. I was able to see Captain O'Brien whenever it was my duty to report and whenever I reported to Captain O'Brien he instructed me with whom I should take the matter up. If it was within my department, I executed the orders he gave, myself.

Redirect Examination

The "Silver Spruce" carried three mates and I have sometimes seen them doing the Captain's work. For instance, this ship did not carry a purser and on occasions when the Captain was confined to his bed it was necessary for the first and second mate to have the papers made out. I would say this happened three or four times. The boat could have been brought safely into port as far as the cargo and ship were concerned, by the mates, even though the Captain was in bed.

Recross Examination

The papers referred to are the necessary shipping papers which must be made out on each trip in connection with the cargo, etc. I know it is the practice on some vessels for someone else than the captain to prepare these papers but the captain must certify them. Whatever work was in connection with these papers I know the Captain always did it but there were certain occasions when the

(Deposition of Barney Magnuson.)

mate did it. I am not familiar with what the exact nature of this work was. All I know was that the papers were connected with the cargo which was carried. On a ship of that size the Captain always made out the papers, but there were occasions on these trips when the Captain was unable to do it, he was sick in bed. Captain O'Brien acted as his own Clerk on the "Silver Spruce." [65]

TESTIMONY OF DR. KENNETH B. FRANCIS.

Dr. Kenneth V. Francis called as a witness on behalf of the plaintiff, after being duly sworn, testified on direct examination:

I am a licensed physician and surgeon, licensed to practice as such in this State. The Medical School I graduated from was St. Mary's, London; London University. Since leaving medical school my post graduate work has been as follows: in London, 1926, National Hospital, Queens Hospital, London Hospital. The National Hospital is a hospital for purely psychiatric cases. My specialty is neuropsychiatry. That includes nervous and mental diseases. At the present time I am connected with the staff of Stanford University, Assistant Clinical Professor of Neuropsychiatry—in other words I teach the subject of mental and nervous diseases to the student doctors at Stanford Hospital. I served during the World War in the British Navy. I also

(Testimony of Dr. Kenneth B. Francis.)

served since the World War in the British Navy in the Medical Department. My rank was Surgeon Lieutenant. I had occasion to examine the plaintiff in this case, Robert Chester O'Brien. I made two examinations, one on the 8th of September and one on the 11th of September, 1933. I examined Mr. O'Brien at the request of Mr. Gerlack for the purpose of ascertaining whether or not in my opinion he is permanently and totally disabled within the purview of this definition (Treasury Decision 20). Regarding the examination I made and the diagnosis arrived at, I made three types of examination, physical, neurological and psychiatric. From the physical examination he had what I diagnosed as osteo-arthritis of the right leg. He also had a slight enlargement of the heart, also had an irregular heart beat. The neurological, which has to do with the nervous system, [66] such as the working of nervous system—I found that his right arm and his right leg were quite weak; the right grip in his hand was weak, also his hip. When he came to me, he had a feeling, a sensation of numbness stretching right up to the upper two-thirds of his thigh; also a numbness stretching right up his right arm. That is the neurological. In the psychiatric, I found him to be extremely nervous to such a degree as to be given a diagnosis of psychoneurosis. The neurological findings, that is the numbness I took to be of hysterical origin, as it had no definite nerve disturbance; that is, the nerves which he had in his

(Testimony of Dr. Kenneth B. Francis.)

arm had a definite disturbance, but this numbness didn't follow that in the leg or the arm. Regarding the picture of the disease of psychoneurosis which I have just mentioned, what it is and how it affects the victim—the mind of each of us can be said to direct the functions of the body and they can be divided really into three divisions; the so-called automatic actions—walking, gestures, expressions of the face; those things which we apparently don't think about, but of course we must carry out and must have some kind of thought about. Then there is the memory; all of those things that have happened to us which have been seen, felt, touched. They come not only as pictures, but also come with feeling about them—pleasant or unpleasant etc. So memory is attached to what we call emotion and it is a function of the mind to be delving into past experiences and emotions and pick out what we need for the immediate moment. Of course the third direction of the mind is the conscious, directed thinking. If we wish to do an act, we don't wish to have all of the experiences of our past; we pick out only that which is useful to us. Also we don't wish to be thinking about such things as walking and gestures etc., we don't wish to be thinking about those things, but to concentrate on the thing [67] immediately in front of us. In psychoneurosis there is a disharmony between those functions whereby directed thinking and concentration on the immediate subject is much impaired; and things which

(Testimony of Dr. Kenneth B. Francis.)

one would normally not think about makes him oversensitive, and too much concentration is placed on them, of course hampering conscious thinking; or, on the other hand, it might be that memories and emotions going with the memories flood the whole system, producing an emotional set up and an emotional feeling which prevents any clear thinking on any present subject he wishes to concentrate on. Therefore bodily sensations can be over-emotionalized, that is, the emotions such as crying without any apparent reason—just because some past memory roused it; he didn't want to cry, nevertheless crying breaks out and he can't help it. Now, directed thinking, which of course, is our intelligent, intellectual self, can be grossly hampered in psychoneurosis by this disability here that is going on. It is my position that psychoneurosis alone is a permanently and totally disabling disease, even aside from his leg trouble, I believe that it is a permanent and totally disabling disease in Capt. O'Brien's case. I wish to say that, of course I can't agree that in any place that the leg and his nervous disease are not one; they cannot really be divided. So interwound, you have got to consider both together.

I have heard read the definition of permanent and total disability (Regulation 11, Plaintiff's Exhibit No. 7). I believe that at the time I examined Captain O'Brien, within the last month or so he was permanently and totally disabled within the purview of that definition. I have heard all of the evidence in court.

(Testimony of Dr. Kenneth B. Francis.)

Q. Now instead of repeating that evidence for the purpose of forming a hypothetical question, we will assume that the evidence you have heard in the courtroom here, including the statements of Captain O'Brien in his testimony, are substantially [68] correct; if that testimony is substantially correct, including his statements as to the history of the case, do you believe he has been permanently and totally disabled within the purview of that definition ever since April 1, 1925?

A. Ever since 1925, yes; and before that.

Q. If those statements are substantially correct, Doctor, give us your reasons for that?

A. Yes. There are several factors, just as in the psychiatric examination; we took the man's own statements and then check them with as many objective facts as we can find, which, of course, was done for me in court here. In 1925 we had one of the witnesses, Mr. Arseneau, who declared to a great degree of nervousness and also rather a strange behavior of the Captain, who called in at all hours of the night. Mr. Arseneau also complained that he had to leave the ship or wanted to leave the ship because Captain's behavior was too demanding on him. I am not sure about it—I think Captain Peterson made some remarks to that same effect as to nervousness. Then there was the record—the medical records as they were displayed. Doctor Linde mentioned nervousness and also in his opinion that occurred previously. There had been two examina-

(Testimony of Dr. Kenneth B. Francis.)
tions made, that is, psychiatric examinations and both of them agreed to neurasthenia. The other surgeons—there had been other examinations which have not been mentioned, it is true, but they were carried out as the psychiatric examinations. In other words, the two psychiatric examinations were carried out and both agreed to psychoneurosis. As to Captain O'Brien's own statement here on the stand, he stated that even as far back as 1920, that he was sleepless, that he could not concentrate, that his leg constantly bothered him, and there was one statement that even after the operation when he was supposed to be improved, that [69] the very fact of his leg being improved for a short while, the fact of that numbness bothered—showing that he had much over-sensitiveness in his feelings, much over-concentration on his injury. Captain O'Brien's further statements of sleeplessness; and I think I have mentioned most of them now—the tremors of the hands which he has; lack of concentration, his irritability, his giving up on several occasions. He apparently attempted to carry on, but every now and then he gave up in extreme despondency, great despondency he had. All of those facts together, and many of them objectively proved by witnesses, and other evidence, give me to believe it dated back to the first objective evidence, which I think was 1923; that at least from 1923 he was permanently and totally disabled.

Q. Doctor, I notice in this examination by Geoffrey H. Baxter, a Government doctor—neuropsychi-

(Testimony of Dr. Kenneth B. Francis.)

atric examination—he examined Captain O'Brien on March 4, 1933, it states "Present Complaint. Nerves all shot. I frequently cry for no reason at all just like a damn fool. I can't sleep and I tremble and shake. Frequently I get a sensation like an electric shock up the right leg and then I have to stop whatever I am doing for a moment." Is that compatible with psychoneurosis?

A. It is. That is compatible with my findings. It is true of Captain O'Brien. In rendering my opinion that Captain O'Brien has been permanently and totally disabled from April 1, 1925, I took into consideration his work on the ships as Master of these various ships since that time. I believe that during the time he was on these ships actually working, he was impairing his health in so doing.

Q. Explain that.

A. For the responsibility and worry as to the ship that [70] he had was constantly getting on his nerves. If I am permitted, I will put it this way: Captain O'Brien has an extreme amount of courage. It was his own courage, however, which really let him down because in this worry and responsibility that he had in the ship, it was only courage which kept him going, and that it was a terrific experience to his whole nervous system, not especially his mentality, and even if he had not been aware of it. This is a supposition; if he had rested and received treatment way back in 1923, I don't think he would be in the present condition he is now at all. I feel

(Testimony of Dr. Kenneth B. Francis.)

this largely is a direct result of lack of treatment and of the heavy responsibilities of the work that he carried out, or tried to carry out because he failed.

Cross Examination.

I examined Captain O'Brien on the 8th and the 11th of September, 1933, yet I am able to set his disability back to 1923, 10 years; the first objective evidence I have of his disability—I will explain that; there are various degrees of psychoneurosis. I cannot admit there are lesser classifications. Psychoneurosis is a matter of degrees. I consider his case of psychoneurosis to be one of a severe degree but I do not think I used that word. There are all degrees of psychoneurosis, from mild to severe. It is a convenient term to use the word "severe". It is convenient for the purpose in this instance—convenient to use the word "severe", but I would not give any limits which is mild or severe. Regarding the difference between psychoneurosis, hysterical state, moderate and severe which Dr. Baxter gives as "moderate", that is precisely why I would not agree to make those definitions depend upon each person—that happens to be my idea of "severe"; Dr. Baxter's would be different. I interpret and use the terms "moderate" or "severe" just as the dictionary defines them; my [71] testimony differs here from the doctor who said it was moderate; in other words I reach a different conclusion from my observations on that point, with this difficulty; what

(Testimony of Dr. Kenneth B. Francis.)

might be moderate to Dr. Baxter might be severe to me, and it is very hard to eliminate—I do not know what he means by “severe”. I cannot agree that the medical profession classifies psychoneurosis as mild, moderate and severe. It is possible that what I mean by “severe” can be the same as Dr. Baxter means by “moderate”. I believe in degrees of psychoneurosis. There is a National Committee for mental diseases in New York and it has a definite classification; but it is not purposely rated on degrees of mild or severe; it is rated on the type. Severity of course depends upon the length of its existence; I am alluding to the length of time it has existed. Now then, with this since 1923, 10 years, that is one reason; and the state he is in now—I should say he is severe. If, on the other hand, it would have existed one year and he would have come to me in a much better condition than he is now—I should say it is very mild. In other words, the term “severity” has two interpretations; one as to the length of time it has existed, the other, the prognosis, which means the likelihood of his getting well. In other words it is a question of duration and intensity. I think in this case if he had not the duration he has, I would not classify him as “severe”. I think it is sufficient to be classed as either—both ways. I cannot agree that a man could be in this condition for only one month or so, and be in a worse condition than if he had it for 10 years. It is essentially a long time disease. It is possible that Dr. Baxter in his examination and

(Testimony of Dr. Kenneth B. Francis.)

in his diagnosis as "moderate" could mean the same thing I mean my saying the man's psychoneurosis was "severe". That is possible. Subject to limitations there are degrees of psychoneurosis. [72] This man passed through the various degrees. I think he missed the first step. The first step would be the general working up of his constitution towards his nervous disability. It strikes me that the two explosions he suffered carried him over the first step. The second step was at the time of the explosion, nothing but his own words for this. I am not taking plaintiff's testimony, not even that; what he said in my office regarding the explosion. The third step came from then on, from the explosion on. Regarding when the transition took place from the first to the second step, of course I cannot clearly define the limits between the first and second step. I have what the patient told me in my office, which I understand I am not entitled to consider. Of course in any psychiatric examination, I would have to have objective evidence from the outside as to whether his statements were even partially true. The first objective evidence I have is in 1923. That is why I give that date of 1923 that he was definitely psychoneurotic that date. If the man had not been telling me the truth, my diagnosis would not have been correct. I based my opinion on the history he gave me on the stand and other witnesses. I have plenty of objective evidence besides what he just told me in my office. This psychoneurosis which is present and which we can conveniently call "severe"

(Testimony of Dr. Kenneth B. Francis.)

is interwoven with the leg condition. Even if it can be shown that the leg condition can be greatly alleviated—that the pain can be greatly removed from it—that would not change the psychoneurotic condition. They are interwoven—not in a reversible direction; in other words, once a habit is formed such as this disease, it would be a very hard thing to reverse it. The nerve condition is due in a degree to the condition of the man's leg, it is aggravated. If it were possible to entirely alleviate the pain and all disorder in the leg, that [73] would not necessarily relieve the mental condition—if it is relevant—it is possible that Captain O'Brien will become a patient at Stanford and if I had to make the same statement to him then, while I don't think he can be cured—this is quite outside of the court case—I think he can be somewhat improved, but not cured. I think we can do a little for him but I am afraid not anything that would amount to much.

Referring to the diagnosis as given for psychoneurosis in the different medical examinations here and the three terms used, namely: mild, moderate and severe, I am aware of some of the examinations mentioned, but of course I have to stick to the American Psychiatric Examination rulings in the matter, in other words in a very conservative opinion there can be no such degrees except as stated, as I have stated to His Honor.

I testified in these cases before for Mr. Gerlack, once. I do not know just how the doctor who made

(Testimony of Dr. Kenneth B. Francis.)

that report, interpreted those terms, whether he interpreted them as I did, I based my opinion on the neurological examinations which were shown to me, two of them. Concerning the neuropsychiatric examinations and the degrees of psychoneurosis which were given on those neuropsychiatric examinations, without referring to it, I do not think I could tell you off-hand without refreshing my recollection, I couldn't tell the actual degree. I am sorry, but I still have to repeat that the particular degree cannot be answered. I base it on two things—length of time and intensity. In those reports, that is not the whole report by any manner of mean, we partly discount those particular words. I would not have paid much attention to that feature. Psychoneurosis is the diagnosis made. If the terms used by this doctor who made the examination were being used in the same sense that I use the terms, I would differ from [74] him. I think the man himself is in a better position to tell me the man's condition. In basing my opinion and in setting the time as to the man's permanent and total disability, I took into consideration the statements made by the man from the stand. I was present when the question was read from this application for reinstatement of yearly renewable term insurance: "Are you now in as good health as you were at the due date of the premium in default? Answer: Yes. Q. Are you now permanently and totally disabled? Answer: No. Q. Have you been ill or contracted any disease or

(Testimony of Dr. Kenneth B. Francis.)

suffered any injury or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since lapsation of this insurance? Answer: No."

Captain is of a very curious point of view; he seems to distinguish between sickness and illness and disability, which also he stated in regard to those particular things. I took into consideration the fact that in 1926, seven years ago, he made these statements. If those statements were true, of course my diagnosis would be incorrect; but I do not accept them as having been true—that is the situation. It is in direct conflict with his whole tale. I do not take the statements Mr. O'Brien made at that time to be true. Regarding the statement made by Captain O'Brien in January, 1926, when he wrote—"I have been in Puget Sound several days loading for South America and have lost considerable sleep in moving the ship from port to port, and I am positive that my heart action is normal under ordinary conditions, as I have never experienced any symptoms that would lead me to believe otherwise. I also was a little nervous in passing the examination as the loss of this insurance would be a great blow to me." I don't think that was true. It was making it very mild [75] when it was very severe. Why did he lose so much sleep? He slurs over that, gave us no reason for that, and regarding his statement—"* * * and have lost considerable sleep in moving the ship from port to port"—in other

(Testimony of Dr. Kenneth B. Francis.)

words his duty was such as to considerably upset him. Regarding the statement made by Captain O'Brien—"I have lost considerable sleep in moving the ship from port to port"—and "My vessel carries no doctor (in which case as Master I am also the ship's doctor), and as evidence of my health I can only certify on honor that since September 1919 I have been actively engaged without a break as Master of vessels in foreign trade, and as far as I know, am in as good health as at the time of my being commissioned in the Navy"—I understand he denied that on the stand. I took into consideration the fact that he wrote that letter over his signature in 1925 to that effect, in direct conflict to his previous evidence. I entirely disregarded all of the signed statements the man made; disregarded the fact that he was applying for reinstatement of his insurance at the time I say he was permanently and totally disabled. I am trying to convey to you the impression that the man was either mistaken or was highly exaggerating his condition at that time, but now,—if you mean making him much less mild than he was,—for the reason that "o" has economic pressure behind it. He had a wife and child to look after."

Redirect Examination

In other words, in these examinations of Dr. Wheate and Dr. Baxter, which findings have been read to me—in other words, I concur in their findings but disagree with them in their conclusions. I

(Testimony of Dr. Kenneth B. Francis.)

agree with the diagnosis of psychoneurosis. Their findings for instance, that he cries, etc., these other findings in their examination report—I agree with their findings but [76] disagree with their conclusions as to the extent of the diagnosis, as to the degree of severity, in other words I think they are right in the premises but wrong in the conclusions, always supposing that they mean what I mean. Now regarding these statements, I think it is possible that Captain O'Brien has been severe from that date and not himself been aware of it—that is the nature of it—the very nature of psychoneurosis.

Recross Examination

I examined Captain O'Brien for the purpose of finding out his condition at that time and for the purpose—it developed during the interview—for the purpose of treating him.

TESTIMONY OF WILFORD P. DUHAMEL

Wilford P. Duhamel, called on behalf of the plaintiff, after being duly sworn, testified as follows:

I am Assistant Secretary of the American Legion War Memorial Commission. I have the concession in the club room for the refreshments up there. I have the management of that. Captain O'Brien works in that concession. So far as his physical condition is concerned, which I myself observed in the man-

(Testimony of Wilford P. Duhamel.)

ner in which he performed his duties up there—the leg disability naturally is very apparent and I have noticed his nervous condition which is usually apparent—sometimes more aggravated sometimes less. I would not say he works steady up there. I work two shifts there. I work from about noon until midnight; sometimes from ten in the morning to midnight and Captain O'Brien comes in sometimes during the morning, sometimes during the afternoon, sometimes during the evening; but it is not at all dependable what hours he will work. Many times during the time he has been up there, I have seen him leave and go home during the time when he was supposed to be there. I have seen him up there obviously ill. I do not believe I can [77] tell you any specific occasions and dates and time; many times when he is apparently in pain, obviously. Any movement he makes is painful to him, at times extremely nervous. His position up there—his employment is somewhat temporary; he is there with me. I guess it is permanent as far as I am concerned because the man stays with me out of pure friendship, no other reason. None of us on a permanent position.

Q. Did you employ him for the reason that you thought he could perform the services, or did you hire him because you felt sorry for him?

A. Well, it is not that you feel sorry for a man that you hire him. If I was hiring a man for that position, it would not be the Captain, if I was look-

(Testimony of Wilford P. Duhamel.)

ing for 100% efficiency; if that is what you mean. I hired him because I felt sorry for him.

The COURT: Did you feel that he could give you substantial aid, or was it merely a charitable matter, or both aid and chairty?

A. I say both. I need a little help, if he would fill that bill. It is not as if I needed a man for the work to depend upon him all of the time. He would not do.

Cross Examination

Regarding the income from this concession in the Veterans Building, I will say perhaps when I first opened the concession it was about \$60 a month; it sometimes runs as high as \$250 a month; that is net. I would say it is running less than \$250. Captain O'Brien gets 40% out of that. Now, out of the net, which is around \$250, I pay him 40%, or around \$100. I am not present at all times but I am in the building on an average of 12 to 14 hours of the day. The average time that I am operating that concession, I would say is about 12 hours of that time, 12 hours a day, that is when I am actually there, I do not mean when [78] I have it open. Captain O'Brien is left in complete charge of that concession sometimes 2 or 3 hours at a time. That is not every day. At no regular time is he in complete charge of that during the day. There is sometime, for instance, when I go out to lunch, that he is left in complete charge. I am operating this on the basis that he takes 40%; we are not partners in the venture, not

(Testimony of Wilford P. Duhamel.)

exactly. I am the manager of the concession, it is my concession. I pay him 40%. The expenses are paid out of the income of the concession, but I give Captain O'Brien 40% of the profit. At the present time it is around \$100 per month or less; no, I would not say it was \$100 per month, I say \$100 or less; I could not state unless I looked at the book. I do not think it ran a hundred the last couple of months. Captain O'Brien has been there I believe since April, I am not certain of it. I believe it has not run \$100 the last couple of months. I said around \$250. I think last month—I can't tell accurately without the books; I think \$220 to \$225. Captain O'Brien drew down last month close to a hundred dollars. I think the highest the net has gone is about two sixty.

DEPOSITION OF NORMAN SWARTLEY.

The deposition of Norman Swartley, a witness for the plaintiff, was read in evidence and the same reads as follows:

I have been a master mariner for fifteen years and served with Captain O'Brien on the Steamer "Rotarian", the name of which was later changed to the "Condor". I don't remember the exact dates but it was during the time that Captain O'Brien was master of the "Rotarian". I was first, third mate, then second mate, then first mate. I observed that Captain O'Brien used to be laid up. He com-

(Deposition of Norman Swartley.)

plained of his leg, walked with a limp, and there was a time for two weeks straight that he gave me complete [79] charge of the ship and never got out of bed. I don't remember the date. I used to communicate with him regularly and also spoke to him through the tube. It was his duty to navigate the ship providing he was not laid up. When he was laid up it was my duty to take it over. I also noticed that he was nervous and irritable at times. At those times his face was drawn as though he was in misery. In fact, I had the carpenter make a chair for him so he could sit on the bridge and rest his leg. The purser took papers ashore for him but not always. In places where there was a dock or break-water the Captain could get ashore. The round-trips on this boat used to take about four months. When we would go into Puget Sound the Captain would take the ship in himself if he was up. If he was not up I would take the ship as far as Port Townsend, then the pilot took it. When the pilot took the ship in it was the Captain's duty to be on the bridge. All in all I guess the Captain missed about one-half of the time he should have been on the bridge.

Cross Examination.

When Captain O'Brien was on the bridge with the stool, he could sit on it and perform his duties with the exception of taking sights. These were taken by the mates and were always done satisfactorily. I was with Captain O'Brien for about three

(Deposition of Norman Swartley.)

years and during that time the ship was successfully navigated on every voyage. We never had any accidents and the ship was brought into port successfully every time. There was never any time when Captain O'Brien was not in communication with the parties who were doing any of his work. That was also true when the pilot was on the bridge. The period during which I mentioned Captain O'Brien was in bed two weeks, it was while we were at sea between Peru and the United States. We did not call at any ports during that [80] time and nothing unusual happened. The Captain was in communication with me at all times during that two weeks period.

DEPOSITION OF JOHN E. McLAUGHLIN.

The deposition of John E. McLaughlin, a witness for the plaintiff, was read in evidence and the same reads as follows:

I am Purser on the SS "Capac". I served with Captain O'Brien as Purser on the SS "Rotarian" between October 24, 1925 and June 12, 1927. The Captain was on the ship during all of that time except during the early part of 1927 when he went to the Marine Hospital. Captain O'Brien had trouble getting around the ship, especially in rough weather, on account of his right leg, and lots of times he was confined to his bed during working hours. I could not say whether it was on account

(Deposition of John E. McLaughlin.)

of the injury or not. He could not rest his weight on the leg. I performed some of Captain O'Brien's duties for him. For instance, I would take the ship's papers ashore to the Consul, the register of the crew lists, etc. This is usually done by the master of the ship but in South American ports, where the ship lay out in the open roadstead, or bay, and at times due to rough weather, Captain O'Brien could not navigate the gangway due to his disability and I would act as captain in those cases and take the papers ashore. I did this nearly all of the time. The ship's papers are usually signed in my office but I would take them up to the Captain and he would sign them in his room, at times in bed. Judging from his appearance and facial expression he did appear to be suffering. I observed that the first officer, Mr. Swartley, performed lots of Captain O'Brien's duties. For example, lots of times when Captain O'Brien was confined to his bed, the ship would pass a lighthouse and the mate would call down through the tube phone and tell the master this and the Captain would direct the mate what course to [81] put the ship on. Ordinarily the Captain would go up on deck to verify this. I ate at the same table with Captain O'Brien when he came down but he had about 90% of his meals in his room. Going up and down ladders he made very slow headway. He helped himself with his arms, favoring his right leg. I also noticed that when we were up in Puget Sound he was a little slower when the weather was wet. I very seldom saw Captain

(Deposition of John E. McLaughlin.)

O'Brien up on the bridge navigating the ship. He got about the ship with a limp and used a cane most of the time.

Q. Confining your answer to what you yourself observed, what percentage of the Captain's work on the ship would you say was performed by other members of the crew but the Captain?

A. That is a difficult question to answer because I know that I did a lot of his work, but as far as the navigating is concerned, that was performed by deck officers not in my department, so I could not say what percentage of the work they performed, although I knew they were doing some of it.

Q. You know that yourself, do you?

A. I could not swear what percentage. I know I did all his duties on shore, that is, practically all.

Cross Examination.

As far as I know I believe Captain O'Brien received his salary for the voyage during which he went to the Marine Hospital.

DEPOSITION OF DAVID HURST.

The deposition of David Hurst, a witness on behalf of plaintiff, was read in evidence and the same reads as follows:

I am the master of the Steamer "Cowa". I have known Captain O'Brien for twelve years and served with him first some time in the summer of 1923 until the spring of 1924. This was the [82] "Santa

(Deposition of David Hurst.)

Malta'', a 10,000-ton ship. Captain O'Brien appeared to me to be always lame and at times you could hardly talk to him. His leg seemed to be affected. He was always complaining about his leg. He appeared to be in pain. This was all quite a while ago and I don't remember anything about his facial expression. When I was first mate I shipped in port. Captain O'Brien was in bed and unable to come on the bridge. I was mate and he was master. I also sailed with Captain O'Brien on the "Santa Cruz". We both left the "Santa Malta" together. Captain O'Brien went directly to the "Santa Cruz" and I went on it about a year later. We made one trip to Antofagasta and then went on the "Cacique". We went on the "Rotarian" in February. I was the third mate. While we were on the "Cacique" he appeared about the same, only coming into San Francisco on that trip he could not get on the bridge and the pilot had to bring the ship in. On other trips the Captain brings the ship in, assisted by the pilot. On the "Cacique" the pilot brought the ship in and Captain O'Brien was in his room. He was not able to get out. I know that myself. I was with Captain O'Brien until June 1927 on the "Rotarian". The mates always had to do his work. I know because I did part of it, such as taking the ship in and out of port because Captain O'Brien was not able to get up. He would be in his room in bed and he would seem like a man in agony. At times he seemed like a nervous wreck,

(Deposition of David Hurst.)

could not sleep, could not keep quiet, rolled and tumbled. The ship did not carry a doctor.

Q. What percentage of the time during the time you were Chief Officer or First Mate on the "Rotarian" did you bring the ship in for Captain O'Brien.

A. I do not know just how to answer that, because it happened so often we got so we paid no attention to it. I would say that I brought the ship in myself [83] not quite half of the time. The Purser did the Captain's paper work on the ship. When the ship was lying port on these trips to South America generally the Purser went ashore with the ship's papers. It is the Captain's duty to call on the Consul and take the ship's papers. The Purser did that in every open roadstead when the ship was lying out in the open anchored there. When I left the "Rotarian" in 1927 Captain O'Brien seemed to be getting worse. During the time I served with him I put him in the hospital at Antofagasta at one time and at Callao at another time. Captain O'Brien's condition was always worse, or appeared to be worse, just before bad weather.

Cross Examination.

Captain O'Brien was in the hospital at Antofagasta for a short time and in Callao for about twelve days. These periods were on different voyages. We made in all about twelve voyages and I don't remember the Captain going to the hospital at any other time. In the South

(Deposition of David Hurst.)

American ports we used to call in about ten or fifteen ports going down and six or seven coming back. He would not be able to take the ship into half of the ports. In the beginning he was not so bad but he kept getting worse. On the occasions when some one else had to bring the ship in they were in communication with Captain O'Brien by tube and the ship was always successfully brought in. I have served as first mate under other masters but have never brought the ship in for any of them. I never heard any complaint about the papers not being delivered properly. Although the Captain did not go ashore himself, everything was done in regular order. We suffered no mishaps to the vessel and all voyages were successful during the time that I served with the Captain on the three vessels which I have mentioned. I never heard any complaint about how the ship [84] was managed on these voyages. On two occasions, once on the "Cacique" and once on the "Rotarian" the pilots brought the vessels into San Francisco Bay while Captain O'Brien was Master,—to my knowledge. On neither of these occasions was Captain O'Brien on the bridge, he was in his room in bed; he was in communication with the pilot on the bridge, through the tube. The ship was brought in successfully on both occasions. On both of these occasions I was on the bridge with the pilots and in communication with the Captain. It is the duty of the First Officer to do the work I did on these occasions,—it

(Deposition of David Hurst.)

is, and it is not—it has to be done—somebody has to do it. It is not the duty of the First Mate when the Captain is aboard ship, but it is his duty when the Captain is not able to. It is the First Mate's duty to do it whether requested by the Captain or not,—it has to be done. If the Captain asks him to do anything,—cooperating with him and under his orders, it is the duty of the Mate to do so. I do not know whether at any time while I served with Captain O'Brien on any of these ships I have mentioned, Captain O'Brien was laid off by the owners of the ship. He was continuously employed in connection with his duties. I surmise he was paid a salary during all of the time,—I do not know. After I left the "Rotarian" I know that Captain O'Brien continued for a certain length of time, to navigate ships, because we were working in the same company.

Redirect Examination.

The fact that the ship was properly navigated was due to both Captain O'Brien and the Mates. I have had twenty years experience as a master mariner and I would say that his knowledge as a master of a ship was excellent, more than ordinary, but his physical ability did not fit him. [85]

DEPOSITION OF DR. WILLIAM G. DORAN.

The deposition of Dr. William G. Doran, a witness on behalf of Plaintiff, was read in evidence and the same reads as follows:

(Deposition of Dr. William G. Doran.)

I am a duly licensed physician for the State of New York and a graduate of the University of Cornell in 1911. As far as I can recollect, I examined Captain O'Brien August 29, 1927, at the Marine Hospital, No. 70, New York during my course of routine duties as consulting Orthopedic Surgeon. At that time he gave me a history that his disability of his right knee had extended from approximately the year 1912, at which time his leg was broken, and a second injury to his knee in 1916; the third injury is 1918. As a result of these injuries he was complaining of a disability in his right knee and his leg at the time of my examination, which was the first time I saw him in August, 1927. I examined him with the object of finding out if possible the degree of deformity in his knee. My examination disclosed that he had a destructive type of arthritis of his right knee joint, with a deformity which prevented a considerable amount of normal motion of that knee joint. There was a limited amount of motion but it was relatively small, far less than normal. An X-ray examination which supplemented my physical findings disclosed that the patient's loss of function was due to a degree of injury in the right knee joint. The X-ray which I used was taken by one of the other doctors in the hospital and it showed that the injury, which we would call infective arthritis, produced the disability which was then existing, namely, restricted use of the joint and pain in the use of the joint. I recommended that he submit to an operation in his knee joint. As far as I recol-

(Deposition of Dr. William G. Doran.)

lect that was the last time I saw him, and on August 29, 1927, I believed him to be totally [86] disabled and I do not think he had the ability to go out and compete with men of sound mind and bodies and average attainments under the usual conditions of life and do it continuously and make a decent living at it.

Cross Examination.

I examined Captain O'Brien in the regular course of my duties.

Q. You stated that in your opinion the plaintiff in this action was permanently and totally disabled at the time of your examination in 1927, by that you mean that he could not follow continuously any substantially gainful occupation of a manual type, in stating that opinion did you take into consideration the mental attainments of the individual?

A. I think so, yes.

Q. Were you aware of the work which he had been customarily doing prior to that time?

A. He told me that he was a seafaring man.

Q. Would your opinion, which you have just given, be influenced by the fact, and I submit Mr. Hurley that these facts will be proved in evidence at the time of the trial, that prior to your examination in 1927, that is from 1925 to 1927 that he had been following his occupation as a seafaring man?

A. The facts that you have just related were told to me also by Mr. O'Brien. The only important change in that would be that he did not work con-

(Deposition of Dr. William G. Doran.)

tinuously, as a seafaring man, but that due to the disease he had to be interrupted frequently for treatment. Giving my opinion as to his total and permanent disability, I think I took into consideration his mental attainments, however if he was able to pursue his normal occupation of course my opinion would be subject to that fact, that is, if he were able to pursue it continuously. I don't know whether or not he followed the suggestions [87] I gave him as to treatment. I could not state that in 1925 he was totally and permanently disabled according to the definition, but I can state that in 1927 he was permanently and totally disabled. Captain O'Brien, if he had the mental ability and proper training and was qualified, could be a doctor or lawyer but could not follow it continuously in the light of his previous physical condition. As a result of my examination in 1927 I would say that it was reasonably certain that the condition I found would be present throughout the entire life of the patient in varying states. If he had followed with an operation I can't say whether his disability would be total, as it is just guess, and I don't want to give any false opinion.

Redirect Examination.

The statement that the patient was totally and permanently disabled within the definition at the time I examined him is my opinion not my diagnosis but if the physical condition of the patient as I determined it on August 29, 1927, was similar

(Deposition of Dr. William G. Doran.)
and equal to the physical findings on March 31, 1925, my opinion would be that he was totally and permanently disabled at that time.

(Mr. Lynch) Inasmuch as plaintiff rests, we would like at this time to make a motion for a directed verdict inasmuch as no evidence has been brought forward to show that this man was permanently and totally disabled at the time his policy lapsed and on the further ground that it has been shown that this man worked practically continuously from before the time his policy lapsed until 1930; as a matter of fact it has been shown this morning that he is working at the present time.

(The Court) Motion denied.

(Mr. Lynch) May I have an exception?

(The Court) Yes. [88]

TESTIMONY OF ERNEST WRIGHT

Ernest Wright, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

I am the Pacific Coast representative of the Kerr Steamship Company.

Q. Will you tell us what the records show as to when Captain was employed by the Kerr Line and how much salary he received?

A. Captain O'Brien was employed, actually on the ship, on January 31, 1928.

Q. He was actually on the ship at that time?

(Testimony of Ernest Wright.)

A. At that time, but he was employed about a month prior to that time while taking the ship over,—looking after our interests. He wasn't actually Master at that time. The position as Master did not commence until January 31st. He continued as such until about the 26th of February, 1930, when he resigned. He received \$300 a month salary. When a man resigns we have the practice of not reemploying him. If he had not resigned we would have continued him in our employ. The Kerr Line had no objections to his continuance.

TESTIMONY OF CLARENCE A. NELSON

Clarence A. Nelson, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

I am Auditor of the W. R. Grace Company. I am custodian of certain records of that company and have with me the salary and employment record of Captain O'Brien. He first went to work for the Grace Company on February 2, 1924, as master of the SS "Santa Cruz". He continued on that ship until December 25, 1924. He was receiving a salary of \$270 a month, plus \$25 a month for uniforms. He transferred to the SS "Cacique" and remained on that [89] ship until February 11, 1925. The salary he received during that time was also \$270 and \$25 a month uniform allowance. He transferred to the SS "Rotarian" on February 11, 1925, as mas-

(Testimony of Clarence A. Nelson.)

ter and continued on that ship until he left the Company's employ on June 12, 1927. His salary remained at \$270 a month and \$25 uniform allowance until April 30, 1926, and thereafter he received \$300 a month. Captain O'Brien resigned of his own accord.

Q. Do you know why Captain O'Brien left the employ of the Grace Company?

A. Only what I heard. I understand illness.

Cross Examination

I did not know personally if Captain O'Brien's work as master on the ship was performed by the mate or purser.

Q. By the way, isn't it a fact that he resigned from the Grace Line as master to enter the hospital?

A. I understand there was a certification at that time and also he was away on a thirty-day leave. The books show he took a thirty day leave on account of illness.

Redirect Examination

Captain O'Brien was paid his salary during the time he was on sick leave.

TESTIMONY OF DR. EDWARD W. TWITCHELL

Dr. Edward W. Twitchell, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of Dr. Edward W. Twitchell.)

I have been a duly licensed physician in California for forty years and I am a graduate of Cooper Medical College. I have done a great deal of post-graduate work in German and French schools from 1895 to 189 and then in 1908 for a period of seven months in German and French schools. I have specialized in nervous and mental diseases and at the present time I am [90] Professor of Neuropsychiatry at the University of California. I also established and at the present time I am Director of the Psychopathic Ward in the University of California Hospital at San Francisco. In a general way physicians don't classify psychoneurosis except to say one is worse than the other. For Bureau purposes in the Veterans Administration they are classified as mild, moderate and severe. The diagnosis of psychoneurosis, mild, generally means that it is of such a degree that it does not incapacitate the individual at all. It does not entitle him to compensation. A moderate degree of psychoneurosis means that it is severe enough to be a definite handicap to him in his work or profession and justifies the giving to him of a greater or less amount of compensation. Whereas the degree of severe means anything up to total disability. A man with severe hysteria would not be able to carry on. A mild degree of hysteria would be compatible with a man holding a responsible position of that sort but a severe degree of hysteria would certainly incapacitate a man for any very responsible position. If Captain O'Brien were employed by various steamship companies as master mariner

(Testimony of Dr. Edward W. Twitchell.)
in full charge of their ships at salaries ranging from \$275 to \$300 a month up until 1930, I can not conceive of a man with severe hysteria being employed at any very exacting occupation. Severe hysteria is really a very disqualifying thing and I don't think he could do even fifty percent of the work. A man who is suffering very severely from pain, or greatly crippled, would naturally find his psychoneurosis greatly increased. If he could be relieved of pain it would likewise be a very beneficial thing. Hysteria, as I understand it, is a condition which is motivated. In other words, a man or woman with hysteria, has an end in view and not necessarily conscious of it. A man becomes hysterical and a woman becomes hysterical [91] for various reasons. They are endeavoring to achieve a certain goal, whatever the goal is, and they are getting at it by a devious route instead of by a direct route. The goal may be an escape from a sentence of some sort or may be getting rid of some intolerable situation. A man will be hysterical because there is a certain situation in his own business which he dares not face, and as long as he is hysterical he does not have to face the situation. He can avoid the difficulties by being hysterical. If the difficulty is cleared up the hysteria and its manifestations are cleared up along with it. Plenty of people become hysterical in a desire for compensation. State records are full of individuals who are hysterical during the time of litigation. When the litigation is finished, often times even for or against, the hysteria is finished.

(Testimony of Dr. Edward W. Twitchell.)

Cross Examination

The bird illustration is simply an explanation of what hysteria is,—the nature of hysteria. Neurasthenia is rather a different situation: a neurasthenic is an individual who has this condition of abnormal tiredness, abnormal exhaustion and neurasthenia is not motivated. You do not find the same motives nor you don't find the same manifestations. You cannot say for example that neurasthenia paralyzes the anesthetic areas that you find in hysteria. The terms psychoneurosis, hysteria and neurasthenia are really contradictory, the two things really do not co-exist. I never examined Captain O'Brien in my life,—never saw him before I came into the court room; I do not know whether he was totally and permanently disabled and I am not in position to say,—I do not know anything about him. There is such a thing as traumatic neurasthenia. It is a neurasthenia caused by some terrible experience such as being blown up by a mine, [92] —things of that sort, yes. It is a fact, if it were shown to me that in the spring of 1919, while sweeping up mines in the North Sea, the minesweeper had a German mine get afoul of which is known as a kite contraption alongside of the boat that sweeps in these mines and while reeling it in, when the mine alongside of the ship, the mine blew up.—the mine weighing approximately 900 pounds,—the large portion of that being the bursting charge, and it blew up, and the concussion threw

(Testimony of Dr. Edward W. Twitchell.)

Captain O'Brien across the deck and underneath a large spool that reeled in the mines,—it is a fact that an experience like that could have been the cause of traumatic neurasthenia or trauma psychoneurosis. Things of that sort frequently cause a traumatic psychoneurosis,—hysteria or neurasthenia anxiety neurosis. I am not contending in this particular case that Captain O'Brien is assuming a hysterical attitude in order to get a verdict out of this jury, or to get any benefit from the Government,—I am not assuming anything.

Redirect Examination

Psychoneurosis, which follows traumatism, should come along very shortly after the actual injury or shock. It does not have any long period of waiting, months and months, and years and years. Trauma neurosis should follow very shortly upon the traumatism.

TESTIMONY OF DR. PAUL E. JOHNSON

Dr. Paul E. Johnson, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

I am a physician and surgeon, graduate of the University of Louisville. At the present time I am Chief Surgeon at the Veterans Hospital at Palo Alto. I made a surgical examination of Captain O'Brien when he was a patient at the Veterans

(Testimony of Dr. Paul E. Johnson.)

Hospital at Palo Alto, July 13, 1931. At that time I found limitation [93] of motion in the right knee, which was severe and due to arthritis, former injuries and operations on the knee. I think the condition could be alleviated to a very large extent by an operation. This would consist of an excision of the knee, which means cutting out the joint's surfaces and causing the bones of the leg and thigh to grow together. That does away with the synovial membrane and cartilage in the knee which causes the pain, making a union between the femur and tibia. A man of course has a stiff knee following the operation but he is relieved of his pain. The leg is usable after the operation. This is not an uncommon operation and I have performed them myself. A man who has a stiff knee is very likely to be awkward in moving about and very frequently they throw an undue strain on the knee, producing acute inflammation of the joint. These repeated traumas are the cause usually of his incapacity. In other words, while he has no acute condition in the knee, he gets along fairly well and the only inconvenience being the loss of motion which he has. When he stumbles and hurts the knee he has an acute inflammatory condition set up which may last anywhere from a week to two or three weeks, or a month or more. By doing away with the knee joint and cutting out these surfaces that become inflamed, we do away with that pain. The case which I referred to as having operated on this year, and

(Testimony of Dr. Paul E. Johnson.)

the conditions we are just speaking of, are similar. In that operation I removed the entire joint surface and caused a union between the bones of the thigh and the leg, with very good results, and he was entirely relieved of his acute symptoms and was able to get about more satisfactorily on the knee. In this particular case I would not only recommend that type of an operation but I did recommend it at the time O'Brien was in the hospital at Palo Alto in 1931. [94] The Captain said to me he wanted it done but his business affairs were such that he couldn't spare the time then but he would come back later and have the operation. A man with a knee in the condition that it would be in after an operation of that sort is performed would be able to carry on any occupation. He would not be incapacitated very greatly except for a position that required an unusual amount of manual labor or heavy work.

Cross Examination.

I am sure that I am referring to Captain O'Brien when I say he told me he could not have an operation on account of business affairs because I have it in my records. At that time he told me he wasn't doing anything. It is not likely that an operation on the knee would cause the osteomyelitis condition to flare up again. I did not make a diagnosis of osteomyelitis although it is likely he did have it at one time. That is my signature appended to "Plaintiff's Exhibit #6", and where it says "osteomyelitis

(Testimony of Dr. Paul E. Johnson.)

right knee, apparently quiescent", the word "quiescent" means that he had it in the past but not then. We use the term "apparently" quite often when we are very sure that it is quiescent. The expression "once osteomyelitis, always osteomyelitis" is sometimes used among orthopedists but it refers to conditions in which you have periods of suppuration in osteomyelitis. No evidence of any suppuration in this case at all.

Q. What is the cure for osteomyelitis, Doctor?

A. Well, there is no cure other than nature sometimes cures it herself; not only sometimes, but very often.

Q. Should a person with osteomyelitis work?

A. Yes, if it is not active.

Q. Is it advisable for a person with osteomyelitis of the kneew to walk around and bend the knee, or should the knee be at rest? [95]

A. Yes, in period of quiescence and remission there is no harm done at all. I do not know whether Captain O'Brien was suffering from any nervous trouble at the time I examined him because I did not examine him for that. Captain O'Brien might have been permanently and totally disabled from a nervous trouble known as neurasthenia, and I, being an orthopedic specialist and not a specialist in nervous and mental diseases, could not say whether that is true or not.

TESTIMONY OF MERRILL C. DARR.

Merrill C. Darr, called as a witness for defendant, after having been duly sworn, testified as follows:

I am General Auditor for the McCormick Steamship Company and I have with me the records relating to the employment of Captain O'Brien. The records show that he was first employed September 24, 1927, as Second Mate on the "West Cactus" and continued in that capacity until December 18, 1927, receiving a salary of \$150 a month. He received all told \$425. The records do not show why he left the employ of the Company.

DEPOSITION OF MAX BLIESATH.

The deposition of Max Bliesath, a witness for the defendant, was read in evidence and the same reads as follows:

I am first officer of the Steamer "Charles McCormick" and was master of the "West Cactus" when O'Brien was second officer. From September 24 to December 18, 1927, Captain O'Brien performed all the duties of the second officer during that time in a satisfactory seamanlike manner. He stood the twelve to four watch afternoon and midnight and always stood his regular watches. It was also his duty to go into the hold of the ship and see that everything was stowed properly and in such a manner as it will come out properly at time of discharge, and Mr. O'Brien performed [96] all of these duties.

(Deposition of Max Bliesath.)

Cross Examination.

I noticed that O'Brien was limping pretty badly but he never complained about anything. I believe he mentioned that he got hurt during the war. He had a little difficulty in getting around but he did his best. I never noticed any of the other boys helping him out any. It is possible that he might have gotten some help but I never helped him myself nor observed anyone else doing it. As second officer he did some navigating, such as taking observations at sea, keeping up the logs and all the clerical work pertaining to navigating. It was not necessary that he be on his feet to any great extent as there is nothing there to keep him on his feet. I have seen lots of fellows follow the job very capably on one wooden leg.

Redirect Examination.

Even though O'Brien limped, he was able to perform his duties on the "West Cactus". There is really no hard labor attached to it. I don't know when he left the "West Cactus", only know he went on as master of another ship.

Recross Examination.

I don't know of O'Brien being in bed with his leg on that trip. As far as I know, he performed his duties. If he had been laid up sick it would have been entered in the ship's log.

Q. If any of the boys or any of the mates were trying to help him out, would it be a black mark

(Deposition of Max Bliesath.)

against him, or if he were sick a day, would it spoil his chance of keeping his job?

A. Of course, if the man is sick, we don't want him on ship board. We don't want anyone who can not perform his duties.

Mr. LYNCH: The Government rests at this time. At this time we would like to renew our motion for directed verdict [97] on the ground that no evidence has been brought forth to show that Captain O'Brien was totally and permanently disabled at the time alleged and he is not even now permanently and totally disabled; on the further ground that the work records brought forth show that he has been continuously employed from the time previous to his alleged disability and for five or six years after his policy had lapsed.

The COURT: Same ruling.

Mr. LYNCH: May I have an exception?

The COURT: Yes.

Thereupon the jury retired and returned a verdict for plaintiff fixing the date of permanent and total disability as of June 30, 1927.

On September 26, 1933, the following stipulation and order was entered into by and between the parties hereto and filed under date of September 29,

after having been approved by the District Judge, before whom the case was tried:

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that the defendant may have to and including the 27th day of November, 1933, within which to prepare, file and serve its proposed bill of exceptions, and

IT IS FURTHER STIPULATED AND AGREED that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the July 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the November 1933 term of said Court to the 16th day of December, 1933, thereof.

And thereafter on the 27th day of November, 1933, it was stipulated by and between the parties to the above-entitled action [98] that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of December, 1933, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so

as to include the November 1933 term of said court to the 16th day of January, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled Court and an order was made by the said Honorable Judge on the 27th day of November extending the term of the Court to and including the date set forth in the stipulation. This order was filed on November 27, 1933.

And thereafter on the 26th day of December, 1933, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of January, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the November 1933 term of said court to the 27th day of January, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 29th day of December, 1933, extending the term of the [99] court to and including the date set forth in the stipulation. This order was filed on December 29, 1933.

And thereafter on the 26th day of January, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of February, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March 1934 term of said court to the 9th day of March, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback Judge of the above-entitled court and an order was made by the said Honorable Judge on the 27th day of January, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on January 27, 1934.

And thereafter on the 27th day of February, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of March, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the July 1933 term of the

above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March 1934 term of said court to the 16th day of April, 1934, thereof. This stipulation was approved by the Honorable [100] Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 1st day of March, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on March 1, 1934.

And thereafter on the 27th day of March, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of April, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March 1934 term of said court to the 17th day of May, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 27th day of March, 1934, extending the term of the court to and including the date set

forth in the stipulation. The order was filed on March 27, 1934.

And thereafter on the 24th day of April, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 11th day of May, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended [101] by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March, 1934, term of said court to the 21st day of May, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 25th day of April, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on April 25, 1934.

And thereafter on the 11th day of May, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 18th day of June, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in this case,

the July 1933 term of the above-entitled court, within which the judgment was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March 1934 term of said court to the 7th day of June, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 11th day of May, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on March 27, 1934.

And thereafter on the 18th day of May, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of June, 1934, and it was further stipulated and agreed [102] that for the purpose of settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the March 1934 term of said court to the 30th day of June, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 18th day of May, 1934, extending the term of the court to and

including the date set forth in the stipulation. The order was filed May 18, 1934.

And thereafter on the 18th day of June, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of July, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the July 1934 term of said court to the 31st day of July, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 18th day of June, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on June 18, 1934.

And thereafter on the 17th day of July, 1934, it was stipulated by and between the parties to the above-entitled [103] action that for the purpose of preparing, filing and serving the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of August, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and

filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the July 1934 term of said court to the 22nd day of August, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 17th day of July, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on July 17, 1934.

And thereafter on the 17th day of August, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, filing and serving the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of September, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the July term of said court to the 30th day of September, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the

18th day of August, 1934, extending the term of [104] the court to and including the date set forth in the stipulation. The order was filed on August 18, 1934.

And thereafter on the 18th day of September, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, filing and serving the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of October, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the July term of said court to the 21st day of October, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 19th day of September, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on September 19, 1934.

And thereafter on the 16th day of October, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing its engrossed bill of exceptions in this case, defendants could have to and

including the 18th day of November, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the November 1934 term of said court to [105] the 8th day of December, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 18th day of October, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on October 18, 1934.

And thereafter on the 19th day of November, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing its engrossed bill of exceptions in this case, defendant could have to and including the 26th day of November, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered, and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the November 1934 term of said court to the 17th

day of December, 1934, thereof. This stipulation was approved by the Honorable Frank H. Kerrigan, Judge of the above-entitled Court and an order was made by the said Honorable Judge on the 19th day of November extending the term of the Court to and including the date set forth in the stipulation. This order was filed on November 19, 1934.

And thereafter on the 7th day of December, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing plaintiff's amendments to the engrossed bill of exceptions in this case, plaintiff could have to and including the 17th day of December, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the [106] July 1933 term of the above-entitled court, within which the judgment therein was entered, and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the November 1934 term of said court to the 22nd day of December, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled Court and an order was made by the said Honorable Judge on the 7th day of December extending the term of the Court to and including the date set forth in the stipulation. This order was filed on December 7, 1934.

On December 7, 1934, the following stipulation and order was entered into by and between the parties hereto.

IT IS HEREBY STIUPLATED AND AGREED by and between the parties hereto, through their respective counsel, that the exhibits for each of the parties hereto, plaintiff and defendant, be forwarded by the Clerk of the above-entitled court, to the United States Circuit Court of Appeals for the Ninth Circuit, and that said exhibits shall be incorporated into by reference, and expressly by reference made and deemed to be a part of this Bill of Exceptions. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled Court and an order was made by the said Honorable Judge on the 7th day of December in accordance with this stipulation. This order was filed on December 7, 1934.

Dated: December 17, 1934.

ALVIN GERLACK,
Attorney for Plaintiff.
H. H. McPIKE,
United States Attorney
Attorney for Defendant. [107]

STIPULATION.

IT IS HEREBY STIPULATED by and between the above-entitled parties and their respective counsel that the foregoing Amended engrossed bill of exceptions is true and correct, and that the same

may be settled and allowed by the above-entitled court and made a part of the record in this case.

ALVIN GERLACK,

Attorney for Plaintiff.

H. H. McPIKE,

United States Attorney,

Attorney for Defendant.

ORDER APPROVING AND SETTLING
BILL OF EXCEPTIONS.

The foregoing engrossed bill of exceptions is duly proposed and agreed upon by counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said engrossed bill of exceptions may be used by either parties plaintiff or defendant upon any appeal taken by either parties plaintiff or defendant.

Dated: December 17, 1934.

HAROLD LOUDERBACK,

United States District Judge.

[Endorsed]: Filed Dec. 17, 1934. [108]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ASSIGNMENT
OF ERRORS.

The United States of America, defendant in the above entitled action, by and through H. H. McPike, United States Attorney for the Northern

District of California, feeling itself aggrieved by the judgment entered on the 16th day of September, 1933, in the above-entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit.

And in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The District Court erred in denying defendant's motion for a directed verdict at the close of plaintiff's case, which motion was made on the ground that all of the evidence was not sufficient to support the allegation to the effect that plaintiff became permanently and totally disabled at any time between April 1, 1925, and July 2, 1927, and continued so permanently and totally disabled to the date of the filing of the complaint.

II.

The court erred in denying defendant's motion for a directed verdict at the close of the case on the ground that all of the evidence was not sufficient to support the allegation to the effect that plaintiff became permanently and totally disabled at any time between April 1, 1925, and July 2, 1927, and continued so permanently and totally disabled to the date of the filing of the complaint. [109]

WHEREFORE, defendant prays that its appeal be allowed that a transcript of the record of pro-

ceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, that this assignment of errors be made a part of the record in its cause, and that upon hearing of its appeal, the errors complained of be corrected and the said judgment of September 16, 1933, may be reversed, annulled and held for naught; and further that it may be adjudged and decreed that the said defendant and appellant have the relief prayed for in its answer and such other relief as may be proper in the premises.

H. H. McPIKE,
United States Attorney,
Attorney for Defendant and Appellant.

Service of the within Petition by copy admitted this 15 day of December, 1933.

ALVIN GERLACK,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 16, 1933. [110]

[Title of Court and Cause]

ORDER ALLOWING APPEAL AND THAT NO
SUPERSEDEAS AND/OR COST BOND BE
REQUIRED.

Upon reading the petition for appeal of the defendant and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment

heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs or damages shall be required to be given or filed.

Dated: December 15, 1933.

HAROLD LOUDERBACK,

United States District Judge.

[Endorsed]: Service of the within Order by copy admitted this 15 day of December, 1933.

ALVIN GERLACK,

Attorney for Plaintiff.

[Endorsed]: Filed Dec. 19, 1933. [111]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of said Court:

Sir:

Please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Complaint.
2. Amended Complaint.

3. Answer to Amended Complaint.
4. Judgment.
5. Petition for Appeal and Assignment of Errors.
6. Order Allowing Appeal.
7. Citation on Appeal.
8. Bill of Exceptions.
9. This Praeceptum.

H. H. McPIKE,
United States Attorney
Attorney for Defendant.

[Endorsed]: Receipt of the within Praeceptum by copy admitted this 20th day of December, 1934.

ALVIN GERLACK,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 27, 1934. [112]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 112 pages, numbered from 1 to 112 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing record is \$20.30; that said amount has been charged against the United States and the original Citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 30th day of January, 1935.

[Seal]

WALTER B. MALING, Clerk,
By B. E. O'HARA,
Deputy Clerk. [113]

United States of America.—ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA

To ROBERT CHESTER O'BRIEN, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein the United States of America is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harold Louderback,
United States District Judge for the Northern Dis-
trict of California this 5th day of January, A. D.
1934.

HAROLD LOUDERBACK,
United States District Judge.

Receipt of a copy of the citation is admitted this
6th day of January, 1934.

ALVIN GERLACK,

[Endorsed]: Filed Jan. 8, 1934. [114]

[Endorsed]: No. 7759. United States Circuit
Court of Appeals for the Ninth Circuit. United
States of America, Appellant, vs. Robert Chester
O'Brien, Appellee. Transcript of Record. Upon
Appeal from the United States District Court for
the Northern District of California, Southern
Division.

Filed January 30, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

